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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 158.

HENRY F. IGLEHART AND MARY I. POLK, APPELLANTS,

vs.

J. HOWARD IGLEHART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANNIE E. I. ANDREWS, DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 8, 1905.

(20,008.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1906.

In the Court of Appeals of the District of Columbia.

HENRY F. IGLEHART ET AL., Appellants,
vs.
J. HOWARD IGLEHART, Executor, &c.
No. 1593.

a Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Late of the District of Columbia, Deceased, Complainant,
vs.
HENRY F. IGLEHART, MARY I. POLK, Fannie Gieson, Genevi-ve Iglehart, Lillie Mimms, Edwin E. Wilson, Edward E. Hewitt, Jessie Hewitt, Pinson Hewett, Ernest Hewett, M. B. Lee, Frank F. Lee, Walter R. Lee, Jennie Iglehart, Lucy Iglehart, and The Greenwood Cemetery Company of Brooklyn, New York, Trustees, a Body Corporate, Defendants.
No. 24938. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Original Bill.*

Filed October 3, 1904.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Late of the District of Columbia, Deceased, Complainant,

vs.

HENRY F. IGLEHART, MARY I. POLK, FANNIE GIESON, Genevieve Iglehart, Lillie Mimms, Edwin E. Wilson, Edward E. Hewitt, Jessie Hewitt, Pinson Hewett, Ernest Hewett, M. B. Lee, Frank F. Lee, Walter R. Lee, Jennie Iglehart, Lucy Iglehart, and The Greenwood Cemetery Company of Brooklyn, New York, Trustees, a Body Corporate, Defendants. } No. 24938.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainant complains as follows:

1. That he is a citizen of the United States residing in the State of Maryland and sues as the executor of the estate of Annie E. I. Andrews, late of the District of Columbia, deceased, under letters of administration issued by the supreme court of the District of Columbia holding a probate court, said letters bearing date March 28th, 1904, and also sues in his own right as the son and heir of J. Howard Iglehart, lately deceased; that the defendants H. F. Iglehart, is a resident of Cameron, Texas; Mary I. Polk is a resident of Washington city, District of Columbia; Fannie Gieson and Gene-

2 vieve Iglehart are residents of San Marcus, State of Texas; Lillie Mimms is a resident of Thurber, Texas; Edwin E. Wilson is a resident of Tyler, Texas; Edward E. Hewitt is a resident of Rockdale, Texas; and that Emma Hewitt, Jesse Hewitt, Pinson Hewett, Frank F. Lee, Walter R. Lee are all residents of San Marcus, Texas; and that said Jessie Hewitt and Pinson Hewitt are infants under the age of twenty-one years; Ernest Hewitt, who is also under the age of twenty-one years, resides at Navasota, Texas; M. B. Lee resides at Snyder, Indian Territory; that Jennie Iglehart and Lucy Iglehart both reside in Baltimore city, State of Maryland; and the said Greenwood Cemetery Company of Brooklyn, New York is a corporation of the State of New York, and that all the natural parties, both complainants and defendants, are of full age, unless specifically stated to the contrary:

2. That Mary I. Polk was a full sister of Annie E. I. Andrews, deceased, H. F. Iglehart a full brother of said deceased; your complainant a son of John H. Iglehart, a full brother of said deceased;

Jennie Iglehart is the widow and Lucy Iglehart the only daughter of the said John H. Iglehart, your complainant and the said Lucy being the only heirs at law of John H. Iglehart, deceased, who was a full brother of the said Annie E. I. Iglehart; that Fannie Gieson and Genevieve Iglehart are the only daughters of —— Iglehart, who was a half brother of the said Annie E. I. Andrews, deceased, and Lillie Mimms, Edwin E. Wilson, Edward E. Hewitt, Emma Hewitt, Jessie Hewitt, Pinson Hewitt, Ernest Hewitt, M. B. Lee, Frank F. Lee and Walter R. Lee are grandchildren of the said —— Iglehart, half brother of the said Annie E. I. Andrews and as such are the only heirs at law of the said —— Iglehart.

3. That the said Annie E. I. Andrews departed this life during the month of April, that is on April 21st 1903, leaving a last
3 will and testament in writing, a compared copy of which is herewith filed as part hereof marked Exhibit "A;" that all the specific bequests of personalty have been duly delivered by your complainant and all moneys paid specifically bequeathed by her will and your complainant is anxious to close up the estate of said deceased and pay or raise to be paid the sum of five thousand dollars to be expended as required in the tenth item of said will and also to carry out the twelfth item of said will, if the bequests and devises made to the said Greenwood Cemetery Company of Brooklyn, New York, as trustee by the first, tenth and twelfth items of said will be good and valid devises or bequests and is desirous only of doing what is his duty in the premises as executor of said deceased.

4. That the only real estate which the deceased died seized and possessed of known to your complainant is the house No. 88 "M" street, northwest, Washington; which said house is in the possession of Jennie Iglehart, the widow of John H. Iglehart; she and her late husband having taken possession of the same as soon as the will was admitted to probate.

5. Your complainant further shows that counsel learned in the law, who represents a number of the heirs at law of the said Annie E. I. Andrews insists that the bequests and devises to the Greenwood Cemetery Company of Brooklyn, New York, are void as being in violation of the rule against perpetuities and it is also claimed that said devises and bequests are void by reason of uncertainty and your complainant has been advised by his counsel that he should come into this court and ask its interposition to have said will construed in accordance with law and be directed in the distribution of the said estate and protected in the performance of his duties as executor aforesaid against the rights,
4 claims and demands of any and all persons having or claiming to have any interest in said estate or any claims and demands under said will as legatees, devisees, heirs or representatives, and your complainant is advised and believes and therefore avers that he is entitled to have said will construed and be directed by this court in what manner he shall distribute said estate and all the parties who are or can be interested under the said will or are or can

be interested as heirs at law or distributees of the said estate (all of whom, as far as known to your complainant, have been made parties) should come into this court and answer this bill and give notice of their respective claims that the same may be adjudicated and settled.

Prayer.

The complainant, therefore, prays as follows:

I. That the United States writ of subpœna may be issued against the said Mary I. Polk of the District of Columbia, commanding her to be and appear in this court and answer the exigencies of this bill.

II. That an order of publication, in the usual form, may be passed requiring the appearance of all the said non-resident defendants.

III. That said will be construed by this court and your complainant may be advised and directed how to distribute the said estate and be protected in the performance of the duties of his executorship.

IV. That if necessary your complainant may have leave to read from the records of the office of the register of wills any and all papers relating to the estate of the said deceased and from the office of the recorder of deeds for the District of Columbia deed or deeds referring to the real estate of which the said Annie E. I. Andrews died seized and possessed or entitled to.

5 V. That the complainant may have such other and further relief as the nature of his case may require.

The defendants to this bill are Henry F. Iglehart, Mary I. Polk, Fannie Gieson, Genevieve Iglehart, Lillie Mimms, Edwin E. Wilson, Edward E. Hewitt, Emma Hewitt, Jesse Hewitt, Pinson Hewitt, Ernest Hewitt, M. B. Lee, Frank F. Lee, Valter R. Lee, Jennie Iglehart, Lucy Iglehart and The Greenwood Cemetery Company of Brooklyn, New York, body corporate.

And as in duty bound,

C. H. STANLEY,
Solicitor for Complainant.

J. HOWARD IGLEHART,
Complainant.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

I, J. Howard Iglehart, do solemnly swear that I have read the aforegoing bill by me subscribed and know the contents thereof and that the facts therein stated upon my personal knowledge are true and that the facts stated upon information and belief I believe to be true.

J. HOWARD IGLEHART.

Subscribed and sworn to before me this 1st day of October, 1904.

As witness my hand and seal.

EDWARD S. STANLEY,
Notary Public.

[SEAL.]

6 I, Annie E. I Andrews widow of E. L. Andrews, residing in the city of Washington, District of Columbia, being of sound and disposing mind and memory, do make, publish and declare this to be my last will and testament, hereby revoking all former wills made be me, that is to say:

First. I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M street, northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them; provided, they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews cemetery lot in perpetual good order and condition.

Second. I give, devise and bequeath unto my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, my entire household effects, consisting of carpets, furniture, silverware, glassware, chinaware, bedding, books, pictures, and clothing.

7 Third. To my niece, Lucy Iglehart, daughter of J. H. Iglehart of Baltimore, Maryland, I give and bequeath my gold watch, also my gold bracelets, also my solita-re diamond earrings, also my opal and diamonds rings, also my plain opal ring.

Fourth. To my nephew, George Andrews, son of S. M. Andrews, of Washington, D. C., I give and bequeath the gold watch and also the diamond stickpin which belonged to my husband during his life-time.

Fifth. To my nephew, Howard Iglehart, son of J. H. Iglehart, of Baltimore, Maryland, I give and bequeath one of my solitaire diamond rings.

Sixth. To my cousin D. T. Iglehart, Jr., son of D. T. Iglehart, of Austin, Texas, I give and bequeath the other of my solitaire diamond rings.

Seventh. To my brother, H. F. Iglehart, of Cameron, Texas, in addition to what he has already obtained from me, I give and bequeath the sum of one dollar and no more.

Eighth To my sister, Mary I. Polk, of Washington, D. C., in ad-

dition to what she has already received from me, I give and bequeath the sum of one dollar and no more.

Ninth. To Martha Mundell, of Washington, D. C., whose kindly care and attention to me has been deeply appreciated, I give and bequeath the sum of one hundred dollars.

Tenth. It is my will, and I order and direct that five thousand dollars be raised out of my estate to be expended in erecting
8 a suitable monument at the grave of my dearly beloved husband, E. L. Andrews, in Greenwood cemetery, Brooklyn, New York.

Eleventh. I order and direct that my just debts shall be paid with convenient speed.

Twelfth. It is my will and I order and direct that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause one of this my last will, for the purpose and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery-lot in perpetual good order and condition.

Thirteenth. It is my will, and I order and direct that upon my death, my body shall be cremated, and the ashes placed in the grave with the remains of my beloved husband in Greenwood cemetery, Brooklyn, New York.

Fourteenth. I do hereby constitute and appoint, D. T. Iglehart, Jr. of Austin, Texas, and Howard Iglehart of Baltimore, Maryland, as executors of this my last will and testament, and it is my will that they shall not be required to give any bond for the full and faithful performance of the duties entrusted to them by this will.

In witness whereof, I have hereunto signed and sealed this instrument, at Washington, D. C., and do hereby publish and de-
9 clare the same to be my last voluntary will and testament on this nineteenth day of March, A. D. 1903.

ANNIE E. I. ANDREWS.

At Washington, D. C., on this 19th day of March, A. D. 1903, the above-named executrix, Annie E. I. Andrews, signed and sealed this instrument, and published and declared the same to be her last will and testament; and we, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses—

Witnesses:

JANE PAGE.
GEO. N. PAGE.
EULALIA M. COLCORD.

10 *Separate Answer of Green-wood Cemetery.*

Filed December 19, 1904.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

J. HOWARD IGLEHART, Executor, etc., Complainant, *vs.* HENRY F. IGLEHART ET AL., Defendants. } In Equity. No. 24938.

Separate Answer of the Green-wood Cemetery, a Corporation, to the Bill of Complaint Exhibited Against It and Others in This Cause.

This respondent now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this respondent is advised it is material, or necessary for it to make answer to, answering says:

1. Answering paragraph 1 of the bill, this respondent admits as true so much of the averments thereof as charge the citizenship and residence of the complainant and the capacities in which he files the said bill, and that this respondent is a corporation of the State of New York, but as to the other matters and things therein charged this respondent is not informed and can neither admit nor deny the same.

11 2. Answering paragraph 2 of the bill, this respondent says that it knows nothing of its own knowledge of the statements therein made touching the names, ages, and relationship to Annie E. I. Andrews, of the other respondents named in the said bill, and therefore can neither admit nor deny the same, but requires strict proof thereof if the same be deemed material.

3. Answering paragraph 3 of the bill, this respondent admits as true that Annie E. I. Andrews departed this life on the 21st day of April, 1903, leaving a last will and testament in writing, a copy of which is attached to said bill of complaint.

Further answering said paragraph this respondent says that it does not know of its own knowledge what specific bequests of personalty or other legacies have been paid by the complainant but, this respondent says that none of the bequests or devises to it, as provided under the terms of the said last will and testament, have been paid by complainant as executor thereunder or by any one else. And further answering said paragraph this respondent denies that there is any doubt as to the validity of the bequests and devises to

it, but says that the bequests and devises to it under said will are in all respects good and valid.

4. Answering paragraph 4 of the bill, this respondent says that it knows nothing of its own knowledge as to whether the premises known as No. 88 M street northwest, in the city of Washington, District of Columbia, is the only real estate of which Annie E. I.
12 Andrews died seized and possessed, and therefore cannot admit nor deny the same, but requires strict proof thereof if the same be deemed material.

Further answering said paragraph this respondent says that by virtue of the will of the said Annie E. I. Andrews, this respondent is the owner in trust of the said real estate known as premises No. 88 M street, northwest, in the city of Washington, District of Columbia.

5. Answering paragraph 5 of the bill, this respondent denies that the bequests and devises to this respondent as trustee are void as being in violation of the rule against perpetuities, or by reason of uncertainty, or for any other reason whatever, but this respondent is advised and believes and therefore alleges that said bequests and devises are in all respects valid in law, and that this respondent is entitled to have the complainant, as executor under the said will of the said Annie E. I. Andrews, carry out the provisions of the said will, and deliver to this respondent as trustee all the property in his possession, or under his control as said executor to which it is entitled as trustee under the provisions of the said will.

And now having fully answered this respondent prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

THE GREEN-WOOD CEMETERY,
By SAM. CAREY, *Comptroller.*

BERRY & MINOR,
HUGH B. ROWLAND,
Solicitors for Respondent.

13 STATE OF NEW YORK, } ss:
County of New York, }

Samuel Carey, being first duly sworn according to law, deposes and upon oath says that he is the comptroller of the Green-wood cemetery, a corporation, and that the matters and things stated in the foregoing answer of the Green-wood Cemetery upon personal knowledge are true and those things stated upon information and belief affiant believes to be true.

SAM. CAREY.

Sworn to and subscribed before me this 16th. day of December, A. D. 1904.

JOHN VIMONT LYLE,
Notary Public, N. Y. Co.

[SEAL.]

EXHIBIT A TO ANSWER.

Filed May 1, 1905.

Act Incorporating the Green-wood Cemetery and Amendments, etc.

* * * * * * *

Authority to hold grants and bequests in trusts.

SEC. 6. The said corporation may take and hold any grant, donation, or bequest of property upon trust, to apply
14 the same or the income thereof, under the direction of the board of trustees for the improvement or embellishment of the said cemetery, or for the erection, repair, preservation,

Trust purposes.

or renewal of any tomb, monument, or gravestone, fence, railing, or other erection, or for the planting and cultivation of trees, shrubs, flowers or plants, in or around any cemetery lot, or for improving the said premises in any other manner or form consistent with the design and purpose of this act, according to the terms of such grant, donation or bequest.

* * * * * * *

Answer of Defendant.

Filed January 9, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Late of the District of Columbia, Deceased, Complainant, *vs.* H. F. IGLEHART, MARY I. POLK, FANNIE Gieson, Genevive Iglehart, Lillie Mimms, Edwin E. Wilson, Emma Hewitt, Edward E. Hewitt, Jesse Hewitt, Pinson Hewitt, Ernest Hewitt, M. Lee, Frank F. Lee, Walter R. Lee, Jennie Iglehart, Lucy Iglehart, and "The Greenwood Cemetery Company of Brooklyn, New York," Trustees, a Body Corporate, Defendants.	Equity. No. 24938.

The joint answer of Henry F. Iglehart, Mary I. Polk, Fannie
15 Gieson, Genevive Iglehart, Lillie Mims, Edwin E. Wilson, Emma Hewitt, Frank F. Lee, Walter R. Lee, and M. B. Lee.

Your respondents answering say:

1. That the citizenship and residence of complainant are admitted and also the capacity in which he sues. That the residence and

minority of the several defendants are true as alleged as well as the incorporation of the Green-wood Cemetery Company of Brooklyn, New York.

2. That it is true as alleged that the defendant Mary I. Polk, and H. F. Iglehart were a full sister and brother of the late Annie E. I. Andrews, deceased. That the relationship of the other defendants is admitted as alleged.

3. That it is true that the said Annie E. I. Andrews departed this life about April 21, 1903, leaving a last will and testament, and your respondents believe that practically all the specific bequests of personalty and of money have been delivered and paid as requested in said will.

4. That it is admitted that the only real estate of which the said Annie E. I. Andrews died seized and possessed is house No. 88 M street, in the city of Washington, District of Columbia. That respondents are not informed of the facts, but they do not doubt that said house is in the possession of Jennie Iglehart, the wife of the late J. Howard Iglehart and that she and her late husband took possession of the same as soon as the will was admitted to probate and record.

16 5. That it is true that respondents claim that the bequests and devises to the Greenwood Cemetery Company of Brooklyn, New York, in sections first, tenth and twelfth, are void, as being in violation of the rule against perpetuities and also for uncertainty and unreasonableness.

6. That your respondents answering further allege that the provision contained in paragraph ten of said will directing $5000 to be raised out of testatrix's estate and expended in erecting a suitable monument at the grave of E. L. Andrews in Greenwood cemetery is void on account of uncertainty, because no person is specifically charged with the trust, and no one is designated as a person competent to pass upon a "suitable monument." Furthermore the will provides that $5000 shall be expended in "erecting" a monument, but does not provide how much money is to be expended in its purchase. The respondents further allege that said provision is void for unreasonableness, because the sum allotted for such monument is largely in excess of that usually expended for such a purpose by those in the station of life occupied by the said testatrix and her late husband, and exceeds the sum necessary for the purpose designated. That the said testatrix was for a number of years before her death employed in one of the departments of the Government on a very meagre salary and was by nature and habit of a very penurious disposition, and from her small salary she saved through economy and by depriving herself of many of the comforts of life, a greater part of the small fortune she now desires to leave to the cemetery company. That neither the said testatrix nor her husband at the time of their decease had any title or claim to

17 the Andrews cemetery lot or any right of interment therein and the owner thereof would have the right to prevent the

erection of said monument thereon if he or she so desired. That upon information and belief respondents charge that the ashes of the said testatrix have not been placed in the cemetery lot, and it is not known by your respondents whether there is objection to their interment there by the owner, or whether it is because the Andrews cemetery lot designated in the will can not be located.

7. That your respondents answering further say that the several bequests and devises, in paragraphs designated first, tenth, and twelfth of the said will and testament of Annie E. I. Andrews are void for uncertainty for the reason that not less than twenty lots in the said cemetery are owned by parties bearing the name of Andrews and are known as Andrews cemetery lots and the location of the one intended by testatrix will be difficult, if not impossible to fix.

8. That your respondents answering further say that the said testatrix by and under the terms of her will nominated D. T. Iglehart and Howard Iglehart as co-executors of her said last will and testament, but that the said D. T. Iglehart renounced the executorship and thereafter the said Howard Iglehart qualified as sole executor.

9. That your respondents answering further upon information and belief say that the said Greenwood Cemetery Company has no power under its charter to hold property as trustees for the use and benefit of individuals and it has no power under its charter
18 to hold and sell property and to re-invest the proceeds derived from any such sale for the purposes designated in said will.

10. That answering further your respondents say that the provisions of said will relating to the care and attention to the said cemetery — are unreasonable because the income from the trust fund attempted to be created therein would greatly exceed the amount necessary for the preservation of the said lot. That an income of $12 per year would be amply sufficient for that purpose.

And now having fully answered, respondents pray to be hence dismissed.

MARY I. POLK.
H. F. IGLEHART.
FANNIE GIESON.
GENEVIVE IGLEHART.
LILLIE MIMS, *Per Counsel.*
EDWIN E. WILSON,
Per Counsel.
EMMA HEWITT.
FRANK F. LEE, *Per Counsel.*
WALTER R. LEE.
M. B. LEE, *Per Counsel.*

WALTER C. BALDERSTON,
WILSON & BARKSDALE,
Solicitors for Respondents.

Mary I. Polk on oath says she has read the foregoing answer by her subscribed and knows the contents thereof; that the statements therein made of her knowledge are true and those made upon information and belief she believes to be true.

MARY I. POLK.

18½ Subscribed and sworn to before me this 6th day. of December, 1904.

ALBERT HARPER,
[SEAL.] *Notary Public, D. C.*

Fannie Gieson and Genevive Iglehart on oath say they have read the foregoing answer by them subscribed and know the contents thereof; that the statements therein made of their personal knowledge are true and those made upon information and belief they believe to be true.

FANNIE GIESON.
GENEVIVE IGLEHART.

Subscribed and sworn to before me this 16th. day of December, 1904.

STERLING FISHER,
[SEAL.] *Notary Public, Hayes County, Texas.*

H. F. Iglehart, on oath says he has read the foregoing answer by him subscribed and knows the contents thereof, that the statements therein made of his knowledge are true and those made upon information and belief he believes to be true.

H. F. IGLEHART.

Subscribed and sworn to before me this 10th day of December, 1904.

J. M. SHARP,
[SEAL.] *Notary Public, Milan Co., Texas.*

19 *Answer of Guardian ad Litem.*

Filed Mar. 28, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Late of the District of Columbia, Deceased, Complainant,
vs.
H. F. IGLEHART ET AL., Defendants.
} Equity. No. 24938.

Joint Answer of Edward E., Pinson, and Ernest Hewitt, by Their Guardian *ad Litem.*

Now comes the said infants by their guardian *ad litem* and answering say:

That the said Edward E. Hewitt, Pinson Hewitt, and Ernest Hewitt are infants under the age of twenty one years and they therefore submit their rights and interests in the matters in question in this cause to the protection of the court.

MARY I. POLK,
Guardian ad Litem.

WILSON & BARKSDALE,
Solicitors for Respondent.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the statements therein made of my personal knowledge are true and those made upon information and belief I believe to be true.

MARY I. POLK.

19½ Subscribed and sworn to before me this 28 day of March 1905.

J. R. YOUNG, *Clerk,*
By L. P. WILLIAMS, *Ass't Clerk.*

20 *Replication.*

Filed March 28, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of Will of Annie E. I. Andrews, Complainant,
vs.
HENRY F. IGLEHART ET AL., Defendant.
} Equity. No. 24938.

Complainant herein hereby joins issue with the several defendants herein.

T. L. JEFFORDS,
Solicitor for Complainant.

Agreed Statement of Facts.

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Late of the District of Columbia, Deceased,

vs.

HENRY F. IGLEHART ET AL.

Equity. No. 24938.

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled cause that said cause shall be heard upon the pleadings and the following agreed statement of facts in lieu of testimony, to wit:

21 That Annie E. I. Andrews died in the city of Washington, District of Columbia, which was her last domicil, on April 21, 1903, leaving a last will, a copy of which is offered as Complainant's "Exhibit A" and that complainant was jointly nominated with D. F. Iglehart as executor, but as the latter renounced, complainant duly qualified as sole executor.

That the said testatrix left personal property consisting mostly, of stocks and bonds to the amount of about $7,641.60 and a piece of real estate located in the city of Washington, District of Columbia, estimated at $3000.

That the relationship of the heirs at law and next of kin of said testatrix as set out in the bill of complaint is correct.

That the Greenwood Cemetery Company is a corporation and that the charter and amendments thereto are herewith filed and that they are the law of the State of New York now in force.

T. L. JEFFORDS,
C. H. STANLEY,
Solicitors for Complainant.
BERRY & MINOR,
Solicitors for Greenwood Cemetery Co.
WILSON & BARKSDALE,
W. C. BALDERSTON,
Solicitors for Heirs at Law and Next of Kin.

May 1, 1905.

Sworn to in open court by Tracy L. Jeffords, witness for complainants.

22 *Opinion of Justice Anderson.*

Filed July 11, 1905.

In the Supreme Court of the District of Columbia.

IGLEHART
vs.
IGLEHART ET AL. } In Equity. No. 24938.

WASHINGTON, D. C., FRIDAY, *May* 26, 1905—10 o'clock a. m,

The COURT: In the case of Iglehart *vs.* Iglehart *et al.*, a bill is filed for the construction of a will, in which two questions are presented for the determination of the court,—

First. Is the provision in the testatrix' will valid which directs that five thousand dollars shall be raised out of her estate for the purpose of erecting a monument at the grave of her husband?

Her next of kin contend that since her whole estate only amounts to ten thousand dollars, it was unreasonable for her to devote one-half of it to such use. This contention does not seem to be sound; and it seems to me it could not very seriously have been insisted upon. The testatrix was at perfect liberty to be either reasonable or unreasonable from the standpoint of other people, at least, in disposing of her estate; and unless mentally incompetent the disposition must be upheld. No attempt whatever has been made to raise any question here as to mental competency.

Second. Are the provisions in the testatrix' will valid which
23 leave to the Greenwood Cemetery Company, a New York corporation, her real estate in trust for the use of her brother and his wife for their lives or so long as it is kept in repair and the taxes paid, and at their death or upon failure to keep in repair or pay taxes the house to be sold, and the proceeds, together with the residue of her estate, to be invested in bonds, and the income therefrom to be used by the Greenwood Cemetery Company for the purpose of keeping the Andrews cemetery lot in New York in perpetual good order and condition?

There is no difficulty in getting at the intention of the testatrix conveyed by these provisions, and there is no uncertainty surrounding them. The residue of the testatrix's estate is given to the cemetery company in trust for the purpose stated, and furthermore, upon the death of the testatrix's brother and his wife, or earlier if they should fail to pay taxes or keep the real property in repair, the testatrix's real property is to be converted into money and held in trust by the cemetery company for the same purpose.

The sole question left for determination, therefore is whether there is any principle of law or public policy which prohibits the carrying out of the testatrix's expressed intention.

The contention urged by the heirs-at-law and next of kin of the testatrix is that trusts for keeping cemetery lots in perpetual good order and condition are void, both because they create perpetuities, and because they have no beneficiaries capable of enforcing them.

But whatever may have been the policy of the common law
24 in respect of trusts of this character, it is now expressly provided by statute in this District at the present day that the cemetery associations of this District may take and hold trusts of this character. I cite section 669 of the Code of this District, which I will not stop to read, as a very plain provision in this regard.

As was said by the United States Supreme Court in the case of Christian Union *vs.* Yount, 101 U. S., 360, it is not to be presumed to be against the public policy of the State for one of its citizens to convey property to a corporation of another State for the purpose of enabling it to carry out the objects of its creation, when that State permits its own corporations, organized for like purposes, to take and hold property within its limits.

The Greenwood Cemetery Company is expressly authorized by the laws of New York, the State of its creation, to take trusts of this character. Without stopping to read that authorization, it will be found in section 6 of the amendment to the charter of the cemetery company, which is attached as an exhibit to the bill.

Moreover, even apart from this provision in the Code of this District, it would seem that the trusts in the present case are valid.

So far as the real-estate itself is concerned, the trusts can by no means infringe the rule against perpetuities, because the will expressly directs that the land shall be sold upon the death of the life tenant at all events, and perhaps sooner; thus bringing the devise within a life or lives in being and twenty-one years thereafter.

And so far as the converted proceeds to be held and invested
25 by this New York corporation are concerned, the District of Columbia manifestly cannot be at all interested in the question of whether or not a perpetuity is created. While every State is vitally interested in the holdings of real-estate within its limits, it is not in legal contemplation a matter of concern to any State whether personal property should accumulate in the hands of corporations in any other State. It is for such other State to make such regulations in that connection as it sees fit; and in the present case the State of New York has passed a law permitting its cemetery corporations to take and hold trusts for keeping cemetery lots in perpetual order and condition.

I have cited in my opinion here numerous authorities, including:

Thompson on Corporations, vol. V, sec. 5829, 1894 edition.
Van Sant *vs.* Roberts, 3 Maryland, 11.
Brown *vs.* Tompkins, 49 Maryland, 423.
Church Extension *vs.* Smith, 56 Maryland, 362, 389.
Stickney Will case, 83 Maryland, 325.

A decree will accordingly be signed placing upon the will in question the construction indicated.

THOS. H. ANDERSON, *Justice.*

26 *Decree Construing Will.*

Filed June 2, 1905.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

J. HOWARD IGLEHART, Executor, &c., Complainant,
vs.
HENRY F. IGLEHART ET AL., Defendants. } In Equity. No. 24938.

This cause coming on to be heard upon the pleadings and proof and being argued by counsel on both sides and considered by the court, it is this 2d. day of June, A. D. 1905, by the court adjudged, ordered and decreed that the last will and testament of Annie E. I. Andrews, and the provisions thereof making certain devises and bequests to the Green-wood Cemetery Company of New York in trust for certain purposes therein stated, and also for the erection of a suitable monument at the grave of the husband of the testatrix in the Green-wood cemetery of New York, are in all respects good and valid; and the complainant, the executor of said last will and testament, be and he hereby is authorized to carry into effect the provisions of the same.

It is further adjudged, ordered and decreed that the complainant in this cause pay the costs of suit.

By the court:

THOS. H. ANDERSON, *Justice.*

27 *Order Allowing Severance.*

Filed June 14, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART ET AL.
vs.
HENRY F. IGLEHART ET AL. } Equity. No. 24938. 55.

Upon consideration of the motion of Henry F. Iglehart and Mary I. Polk, parties defendant in the above entitled cause, for leave to sever from their co-defendants and prosecute an appeal from the final decree in this court to the Court of Appeals of the District of

Columbia, alone, and in their own names, it is this 14th day of June, 1905, ordered that Henry F. Iglehart and Mary I. Polk, be and they are hereby allowed to sever from their co-defendants to prosecute their appeal to said Court of Appeals alone and in their own names.

And it appearing that notice of said appeal was given in open court at the time of signing said decree, it is ordered that the appeal bond for costs on said appeal be, and the same is hereby fixed at one hundred dollars ($100).

THOS. H. ANDERSON, *Justice.*

Memorandum.

June 22, 1905.—Appeal bond filed.

28 *Appellant's Designation of Record.*

Filed June 27, 1905.

In the Supreme Court of the District of Columbia.

J. HOWARD IGLEHART
vs.
HENRY F. IGLEHART ET AL. } Equity. No. 24938.

The clerk in preparing the transcript of record for the Court of Appeals in this case will embody the following papers:

1. Complainant's bill filed October 3, 1904, and copy of will "Ex. A."
2. Answer of Greenwood Cemetery Company, and paragraph six of "Exhibit A," same being the act of incorporation and amendments.
3. Answer of the defendants filed January 5, 1905.
4. Replication filed March 28, 1905.
5. Agreed statement of facts filed May 1, 1905.
6. Opinion of the court.
7. Decree construing will passed June 2, 1905.
8. Order, allowing severance and fixing bond, passed June 14, 1905.
9. Memorandum of bond filed June 22, 1905.

WILSON & BARKSDALE,
WALTER C. BALDERSTON,
Solicitors for Appellants.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 28, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24938, in equity, wherein J. Howard Iglehart, executor &c., is complainant, and Henry F. Iglehart, *et al.*, are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 1st day of August, A. D., 1905.

JOHN R. YOUNG, *Clerk,*
By S. McCOMAS HAWKEN, *Ass't Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1593. Henry F. Iglehart *et al.*, appellants, *vs.* J. Howard Iglehart, executor, &c. Court of Appeals, District of Columbia. Filed Aug. 2, 1905. Henry W. Hodges, clerk.

WEDNESDAY, *October* 18*th, A. D.* 1905.

No. 1593.

HENRY F. IGLEHART and MARY I. POLK, Appellants,
vs.
J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Deceased.

The argument in the above entitled cause was commenced by Mr. N. W. Barksdale, attorney for the appellants, and was continued by Messrs. H. B. Rowland and B. S. Minor, attorneys for the appellee, and was concluded by Mr. Andrew Wilson, attorney for the appellants.

No. 1593.

HENRY F. IGLEHART and MARY I. POLK, Appellants,
v.
J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Deceased.

Opinion.

(Mr. Justice DUELL delivered the opinion of the court:)

This is an appeal from a decree holding valid the last will and testament of Annie E. I. Andrews, and its provisions making certain devises and bequests to the Greenwood Cemetery Company of New York.

The record discloses that the deceased, a resident of the District of Columbia, died in 1903, leaving a will dated March 19, 1903. The amount of the estate was something over $10,000, of which $3,000 was in real estate situate in the District, and the balance personalty. The will having been duly probated, the executor filed this bill for its construction. The heirs contend that clauses one, ten, and twelve are invalid. The first clause devised and bequeathed to the Greenwood Cemetery Company of Brooklyn, N. Y., as trustees, the real property which consisted of a house and lot. This was to be held in trust for the use of decedent's brother and his wife during their life, or the life of either of them, provided that they kept the property in repair and paid the taxes on it. At their death, or upon their failure to comply with the recited condition, the property was to be sold and the proceeds invested in United States securities, the income therefrom to be used by the cemetery company, as trustees, for the purpose of keeping the Andrews' lot in perpetual good order. The tenth clause directed that $5,000 be taken from the estate to be expended for a monument at the grave of her husband, E. L. Andrews, in Greenwood Cemetery. The twelfth clause directed that the residue of her property, after payment of legacies, debts, and the like, be converted into cash and invested in United States securities, and the income therefrom be used by the cemetery company, as

trustees, as an additional fund for the preservation and care of the lot before referred to. The case was heard by stipulation upon the pleadings and an agreed statement of facts. The admitted facts do not require to be set forth as, in our opinion, they do not affect the decision at which we have arrived.

The assigned errors are three in number and relate respectively to the validity of the device of the real estate to the cemetery company, the validity of the residuary bequest, and the validity of the provision for the erection of the monument.

The latter will be first passed upon. There seems to be no question that the decedent's husband was buried in Greenwood Cemetery, and no trouble arises in locating the lot. There is no trouble in carrying out the provision of the will providing for the erection of the monument and no difficulty in upholding the clause relating to it and separating it from the other provisions attacked. The deceased was admittedly of sound mind, left no husband or children surviving her, and was under no legal obligation to leave her property for the support of her relatives. It may be conceded, as claimed, that the amount is greater than ordinarily expended for such a purpose by those in the same station of life as decedent without warranting us in holding that the provision should be overthrown. The court below was not in error in upholding it, and we agree with the conclusion of the learned justice in upholding it and with the reasons adduced by him.

The question of the validity of the bequest of the real estate presents a more serious question. It is contended with much force that the conveyance, or attempted conveyance, of the real estate to the trustee creates a perpetuity, and is, therefore, void. If there were no exceptions to the general provisions of the law applicable to the subject we would be compelled to hold that the devise was unquestionably void, but there are exceptions, and the question ultimately to be decided is whether this devise falls within the exceptions or of any of them.

It is urged on behalf of the Greenwood Cemetery Company that the bequest is valid because it is for a charitable use. At least many of the cases referred to by it are cases where such bequests have been been sustained as being for charitable uses. We think, however, that the bequest can not be upheld on such ground, for the weight of authorities is that bequests for the care of burial lots are void as creating perpetuities, for such uses are not charitable. Bates *v.* Bates, 134 Mass. 110, and many English cases there cited.

The ground upon which the bequest must be sustained, if upon any, is that the laws of the District of Columbia provide that cemetery companies incorporated under its laws can take and hold real estate and personal property, and use the income thereof for the care of cemetery lots, monuments, etc.; and though it is contended by appellants that as the Greenwood Cemetery Company is not incorporated under the District laws, this exception contained in section 669 of the Code does not apply, yet it is admitted that the laws of the State of New York, under which the Greenwood Cemetery Company is incorporated, permit it to take real and personal property

for the purpose of using the income for the care of cemetery lots, renewal of monuments, etc. It will be seen, therefore, that the policy of the law of the District of Columbia, where the deceased was domiciled, makes a clear exception to the common law, and also to the statutory law of the District, so far as cemetery companies incorporated under the laws of the District are concerned; and that the laws of the State of New York, where the proceeds of the real estate are designed to be taken, and where the trustee has its legal abode, permits the trustee to take and hold real and personal property, and creates the same exception. It scarcely seems possible that Congress intended to be so narrow as would be the case if it intended, in permitting cemeteries incorporated under the laws of the District to take and hold property for the purpose specified, to refuse to recognize a like right in similar companies incorporated under the laws of the various States where a like privilege was granted. We think rather that Congress considered that it was necessary to specify companies organized in the District in order that they could acquire and hold property for the purpose specified, and believed it unnecessary to provide that such companies, incorporated under the laws of the States in which they were given like privileges, could take real and personal property situated in the District, and which was to be taken out of the District and administered elsewhere. It is fair to presume that Congress knew of and recognized the rule now well established and generally followed that, "while the laws of the testator's domicile govern as to the formal requisites essential to the validity of the will, the capacity of the testator and the construction of the instrument, the validity of particular bequests depends (unless expressly prohibited by the law of the testator's domicile) upon the law of the domicile of the legatee." Congregational Unitarian Society *v.* Hale, 29 Appl. Div. (N. Y.) 396.

The rule of comity permitting a foreign corporation to acquire and hold lands by devise is now generally recognized, provided their charters permit them so to do, and no prohibition is found in the laws or public policy of the domestic State. Am. & Eng. Ency. Law, vol. 13, page 856, 2d ed. The public policy of the District of Columbia permits in express terms, as shown by express legislation, its cemetery corporations to receive such bequests. The State of New York permits the Greenwood Cemetery Company to hold such bequests as the one in question. It seems to us that it follows from the general law of comity prevailing among the various States of the Union, that we should recognize and uphold the right of this appellee to receive the bequests provided by the will. While there is some conflict in the decisions of the courts of the various States, we think that the decisions of the United States Supreme Court, which are controlling upon us, favor this doctrine of comity. Christian *v.* Yount, 101 U. S. 352. In the light of the decision in that case, it can not be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and

administer such bequests. But the position of the appellee is, we think, much stronger, for we have treated the property devised by the first clause of the will as real property. It appears that the will expressly directs that the real estate shall be sold upon the death of the life tenants, and perhaps sooner. The proceeds are to be invested in personal property. The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personalty from the death of the testator. Hope *v.* Brewer, 136 N. Y. 126; Reiff & Brinkley *v.* Strite, 54 Md. 298. It is unnecessary to multiply authorities upon this point. The real estate being once converted into personalty, it matters even less than in the case of real estate, to the District of Columbia whether such property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses. The District of Columbia, and its residents, are more interested in having the right of foreign cemetery companies to take property, real and personal, situate in the District, for the purpose of the care of cemetery lots, and the maintenance and care of monuments erected thereon, recognized, than other States or their residents can be, for the reason that so many of the people domiciled in the District come from other localities, or are the descendants of those who came from such localities, and, while passing their lives here, expect upon death to be laid in cemeteries located outside the District and which are not incorporated under its laws. In considering the policy of the laws of the District we think this fact should not be lost sight of, and in interpreting its laws we must bear in mind that they are enacted by Congress, which represents all sections of our common country. The law of comity should therefore be recognized even more broadly here than elsewhere, in all questions like the one under consideration.

Irrespective, however, of the peculiar conditions which here exist, we think the weight of authority upholds the decision of the lower court; and, while we were much impressed by the full and careful presentation of appellants' counsel, we do not find sufficient cause for holding that any error was committed in upholding clauses 1 and 12 of the will.

We do not think it necessary to here pass upon the question whether the Greenwood Cemetery Company has power under its charter to act as trustee in the District of Columbia for property here located, and no power to convert the real estate into personalty, for the reason that equity will not allow the trust to fail for want of a trustee, but will, if necessary, appoint a trustee to carry it into effect.

There being no reversible error committed by the court below, it follows that the decree appealed from should be affirmed, with costs. And it is so ordered.

WEDNESDAY, *November 8th, A. D.* 1905.

No. 1593. October Term, 1905.

HENRY F. IGLEHART and MARY I. POLK, Appellants,
vs.
J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Deceased.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE DUELL.

November 8, 1905.

FRIDAY, *November 10th, A. D.* 1905.

No. 1593.

HENRY F. IGLEHART and MARY I. POLK, Appellants,
vs.
J. HOWARD IGLEHART, Executor of the Last Will and Testament of Annie E. I. Andrews, Deceased.

On motion of Mr. Andrew Wilson, of counsel for the appellants in the above entitled cause, it is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

(Bond on Appeal.)

Know all men by these presents, that we, Henry F. Iglehart and Mary I. Polk, as principals, and The United States Fidelity and Guaranty Co. are held and firmly bound unto J. Howard Iglehart, Executor and the Greenwood Cemetery Company, a corporation, in the full and just sum of Three Hundred dollars, to be paid to the said J. Howard Iglehart, Executor and the Greenwood Cemetery Company, a corporation, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Henry F. Iglehart and Mary I. Polk against J. Howard Iglehart and the Greenwood Cemetery Co., the same being No. 1593, a decree was rendered against the

said Henry F. Iglehart and Mary I. Polk and the said Henry F. Iglehart and Mary I. Polk, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said J. Howard Iglehart, Executor and The Greenwood Cemetery Company, a corporation, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Henry F. Iglehart and Mary I. Polk, shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good. then the above obligation to be void; else to remain in full force and virtue.

HENRY F. IGLEHART. [SEAL.]
MARY I. POLK. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, [SEAL.]
Attorney in Fact.

[Seal of United States Fidelity & Guaranty Co.]

Sealed and delivered in presence of—
—— ——.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1593. Henry F. Iglehart and Mary I. Polk, Appellants, *vs.* J. Howard Iglehart, Executor of the last will and testament of Annie E. I. Andrews, deceased. Bond on appeal to Sup. Court U. S. Court of Appeals, District of Columbia. Filed Nov. 23, 1905. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To J. Howard Iglehart, Executor of the Last Will and Testament of Annie E. I. Andrews, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Henry F. Iglehart and Mary I. Polk are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 23d day of November, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 4, 1905. Henry W. Hodges, Clerk.

Service admitted this 29th day of November, 1905.

C. H. STANLEY,
Attorney for J. Howard Iglehart, Executor, &c.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 26 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry F. Iglehart and Mary I. Polk, Appellants, *vs.* J. Howard Iglehart, Executor of the last will and testament of Annie E. I. Andrews, deceased, No. 1593, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of December, A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,008. District of Columbia Court of Appeals. Term No. 158. Henry F. Iglehart and Mary I. Polk, appellants, *vs.* J. Howard Iglehart, executor of the last will and testament of Annie E. I. Andrews, deceased. Filed December 8th, 1905. File No. 20,008.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 11 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 158.

HENRY F. IGLEHART AND MARY I. POLK,
APPELLANTS,

vs.

J. HOWARD IGLEHART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANNIE E. I. ANDREWS, DECEASED.

BRIEF FOR APPELLANTS

ANDREW WILSON,
NOEL W. BARKSDALE,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1906.

HENRY F. IGLEHART AND MARY I. POLK, Appellants,

vs.

J. HOWARD IGLEHART, Executor, &c.

No. 158.

BRIEF FOR APPELLANTS.

This is an appeal, from a decision of the Court of Appeals for the District of Columbia, affirming a final decree passed by the Supreme Court of the District of Columbia sitting in special term as an equity court construing a will. The original bill for construction was filed by the executor against the heirs at law and next of kin of the testatrix and the Greenwood Cemetery Company.

Statement of Case.

Annie E. I. Andrews, while domiciled in the District of Columbia, died April 21, 1903, leaving a last will and testament, dated March 19, 1903, by which she attempted to dispose of her entire estate of $10,641.60, consisting of stocks and bonds estimated at $7,641.60, and real estate, in the District of Columbia, valued at $3,000 (R., 14).

By the first paragraph of her will she devised the said real estate to the Greenwood Cemetery Company, as trustee, to be held in trust for the use of her brother and his wife during their lives, or the life of either of them, provided they should keep the property in repair and pay the taxes. At their death, or upon their failure to repair or pay taxes, she directed the property to be sold and the proceeds to be invested in United States securities, the income therefrom to be used by the Greenwood Cemetery Company, as trustee, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition (R., 5).

By the tenth paragraph she directed $5,000 to be raised out of her estate to be expended in erecting a suitable monument at the grave of her husband in Greenwood Cemetery, Brooklyn, New York (R., 6).

By the twelfth paragraph she directed that the residue of her estate be converted into cash and invested in United States securities, the income therefrom to be used by the Greenwood Cemetery Company, as trustee, together with the trust fund mentioned in the first paragraph, for the purpose of beautifying and keeping the Andrews' cemetery lot in perpetual good order and condition (R., 6).

D. F. Iglehart and Howard Iglehart were nominated as executors. D. F. Iglehart renounced the trust, and after the will was admitted to probate and record, letters testamentary were granted to J. Howard Iglehart. In the course of the executor's administration, a doubt arose in his mind as to the validity of some of the pro-

visions of the will, and so he filed a bill against the heirs at law and next of kin of the testatrix and the Greenwood Cemetery Company asking that the will be contrued and that instructions as to the distribution be given him (R., 2–4). The heirs at law and next of kin answered, attacking the validity of the dispositions contained in the first, tenth, and twelfth paragraphs of the will (R., 9–11). The Greenwood Cemetery Company answered, alleging the validity of said dispositions, and asserting that it is the owner in trust of the said real estate (R., 7–8).

By stipulation of counsel the case was heard upon the pleadings (R., 1–13) and an agreed statement of facts (R., 14).

The Equity Court decided in substance that it could not be presumed that it was against the public policy of the District of Columbia for one of its citizens to devise property to a foreign corporation, when the District of Columbia permits its own corporations organized for like purposes to take property. And as the will directed the real estate to be sold upon the death of the life tenant, or sooner, the trust did not infringe the rule against perpetuities. That as to the converted proceeds the District of Columbia was not at all interested as to whether or not a perpetuity was created. That while every State is vitally interested in the holding of real estate within its limits, it is not a matter of legal concern to any State whether personal property should accumulate in the hands of corporations in other States. The court thereupon

signed a decree holding valid the trusts and the provision for the erection of the monument, and authorized the executor to carry the same into effect (R., 15–17). The appellants, heirs at law, obtained a severance from their co-defendants and appealed to the Court of Appeals of the District of Columbia (R. 18).

That court affirmed the decree of the Supreme Court of the District of Columbia, and in its opinion stated if there were no exceptions to the general provisions against perpetuities that the dispositions made by the will would unquestionably be void, but that the laws of the District of Columbia make a clear exception to the common and the statute law so far as domestic cemetery companies are concerned; and as the laws of New York permit the Greenwood Cemetery Company to take property for perpetual uses, then the general law of comity prevailing among the various States of the Union requires the court to uphold and recognize the right of the Greenwood Cemetery Company to receive the bequests in the will. That the District of Columbia and its residents are more interested in having the rights of foreign cemetery companies to take bequests for perpetual purposes recognized than the States and their residents, and, therefore, the law of comity should be recognized even more broadly in the District than elsewhere. That the real estate was converted into personalty under directions in the will, and that the law as to perpetuities does not apply with the same strictness to personalty as to realty (R., 20–23). The said appellants have now brought the case to this Court for review.

Points and Authorities.

Both the lower courts based their decision in this case on the supposed duty of the court to recognize a foreign corporation through public policy, and although not clothed with the power they have endeavored in their judicial capacity to extend the doctrine of comity to a case not included within the statute, either expressly or inferentially. That general conditions afford enticing opportunities for the recognition of foreign corporations or that the intention of Congress would be very narrow, if they should not be recognized, is no justification for the courts' encroachment upon the field of the legislature and for doing judicially what Congress has failed to do or authorized to be done. The power to indicate a public policy by judicial declaration, which is not found in the statute, should be exercised only in clear cases and generally within limits already defined by decisions of acknowledged authority based upon rules of common law. There is no excuse for stretching that power to new or doubtful cases in any instance, but especially not in the District of Columbia, where Congress is in session several months every year and competent to indicate the public will as to every phase of supposed public policy. The court's assertion that residents of the District of Columbia are more interested than residents of the States in having foreign cemetery companies recognized is a pure supposition unwarranted by law and not established by proof. If such a condition exists, it is for Congress to relieve by appropriate statutes and not for the court to remedy by judicial legislation. Judge

Story, in the Girard will case (2 How., 127), said the court was not at liberty to look at general considerations of the supposed public interests of Pennsylvania upon the subject of public policy beyond what its laws and constitution and judicial decisions make known.

The authority (1879), Christian Union *vs.* Yount, 101 U. S., 352, cited by both lower courts to sustain their position, holds that certain privileges should be extended to foreign corporations "unless prohibited therefrom, either in their direct enactments or by their public policy, deduced from general course of legislation, or the settled adjudications of their highest courts." But in this case there is an absolute prohibition embracing real estate and personal property found in the laws of the District of Columbia. Chapter 24 of the Code, subchapter 1 on Estates, provides as follows:

> "SEC. 1023.—*Perpetuities.*—Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."
>
> * * * * * * *
>
> "All the provisions of this subchapter shall apply to personal property generally except where from the nature of the property they are inapplicable."

Thus it is readily perceived that as the trusts in the will do not come within the exception of Section 1023, they are in contravention of that section relating to perpetuities and in restraint of alienation, and are, therefore, void. It is also evident that the validity of the trusts is to be determined by the laws of the District of Columbia and not of New York, and, as the law applies alike to realty and personalty, the theory of equitable conversion does not change the situation. The doctrine of comity cannot be extended in such a case. As Section 669 of the Code, conferring the privilege of taking property for perpetual uses upon domestic cemetery corporations, is in direct conflict with Section 1023, the former is void. And as the fund to be used for the erection of the monument is so closely identified with the void trust for its care and preservation, the two must fall together.

Before assigning error, one point can be disposed of at the threshold, viz: that the investment of money and the use of income therefrom to keep a cemetery lot in perpetual good order and condition is not a gift or devise for a charitable use and, therefore, it does not fall within the exception of Section 1023 of the Code. The Court of Appeals so decided in this case (R., 21), and this is in accord with both English and American authorities.

(1882) Jones *vs.* Habersham, 107 U. S., 174.

(1903) Estate of Gay, 138 Calif., 552.

(1901) Corle's Case, 61 N. J. Eq., 409.

(1898) Sherman *vs.* Baker, 20 R. I., 446.

(1897) Brown *vs.* Esterhazy, 25 Law Reporter, 478.
(1892) Hartson *vs.* Elden, 50 N. J. Eq., 522.
(1893) Kelly *vs.* Nichols, 17 R. I., 306.
(1891) Read *vs.* Williams, 125 N. Y., 560.
(1889) *In re* Fisher, 8 N. Y. Supp., 10.
(1885) Johnson *vs.* Holifield, 79 Ala., 423.
(1883) Bates *vs.* Bates, 134 Mass., 110.
(1883) Detwiller *vs.* Hartman, 37 N. J. Eq., 347.
(1883) Coit *vs.* Comstock, 51 Conn., 352.
(1883) Fite *vs.* Beasley, 80 Tenn., 328.
(1881) Piper *vs.* Moulton, 72 Me., 155.
(1881) Church Extension *vs.* Smith, 56 Md., 362.

Assignment of Error.

It is respectfully submitted that the lower court erred in holding as follows:

1. That the trusts created by the will do not infringe the rule prohibiting perpetuities and in restraint of alienation.

2. That the validity of the trusts depends upon the law of New York and not of the District of Columbia.

3. That the law of the District of Columbia prohibiting perpetuities and in restraint of alienation does not apply with the same strictness to personal property as to real estate.

4. That the public policy of the District of Columbia as to foreign corporations can be inferred from the law of the District as to domestic corporations.

5. That the same privileges granted by the law of the District of Columbia to its domestic corporations must be extended to foreign corporations.

6. That Section 669 of the Code of the District of Columbia is consistent with Section 1023, and, therefore, valid.

7. That the provisions for the erection of the monument and for its care and preservation can be easily separated without doing violence to testatrix's wishes.

First Error.

As the will creates a future estate, suspending the power of absolute alienation of property beyond life or lives in being and twenty-one years, it is in restraint of alienation and a perpetuity, and, therefore, void in its creation.

The testatrix directed in terms that the proceeds derived from the sale of her property be invested for a perpetual purpose. This, in effect, violates both the law in restraint of alienation and the law prohibiting perpetuities in force in the District of Columbia, the equity court to the contrary notwithstanding. That court said that the trusts in the will could by no means infringe the rule against perpetuities (R., 16), while the Court of Appeals was of the opinion that the devise of the real estate did infringe that rule and would unquestionably be void if it did not fall within certain exceptions (R., 21). As these courts were of different opinions on this point, some definitions as to what are restraints upon alienation and what are perpetuities may throw light upon this subject.

Restraints look to the present, the creation of the estate; while perpetuities look to the future, the vesting of the estate. In perpetuities the vesting may be uncertain;

while in restraints the estate is void in its creation, if suspension is even possible. The power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.

Code, Sec. 1023; (1851) Tucker *vs.* Tucker, 5 N. Y., 408–17; (1839) Gott *vs.* Cook, 7 Paige, 521. The absolute power of alienation is equivalent to the power of conveying an absolute fee. (1895) *In re* Walkerly, 108 Calif., 647.

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. (1877) Ould *vs.* Washington Hospital, 95 U. S., 303. A perpetuity is any limitation or condition which may (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. (1895) *In re* Walkerly, 108 Calif., 647. A perpetuity is a limitation taking the subject out of commerce for a longer period than prescribed by statute. (1884) Lunt *vs.* Lunt, 108 Ill., 307–13. Perpetuity is a word applied to attempts to invest money or restrict the alienation of land in such a way as to forever retain it for the benefit or enjoyment of persons of a particular line of descendants. (1894) Whitney *vs.* Dodge, 105 Calif., 192–200.

Under the directions contained in the will the principal vests in the trustee and is withdrawn forever from the channels of commerce and completely tied up. If the intention of the testatrix prevails there must be manifest violation of the law, for the will by its language suspends the power of absolute alienation of the prin-

cipal forever thereafter. The beneficiary of this trust is the cemetery lot, and there is and will be no person in existence who can direct or consent to alienation of this property. The whole estate is vested in the cemetery company as trustee of the fund, and any disposition of the *corpus* of the estate of the beneficiary would be a contravention of the trust and a breach of its duty. This works a suspension of the power of absolute alienation, and is therefore void.

Section 1023 of the Code, declaring a future estate suspending the power of alienation void in its creation, is most positive in its terms. The purpose of the statute is to discourage and prevent persons subject to the laws of the District from disposing of property when unlawful limitations are attached thereto. It is designed for the protection of persons interested in the estate of inhabitants of the District of Columbia, and it strikes at the very root of the evil by declaring void in its creation every instrument which suspends, or may by any possibility suspend, the power of absolute alienation of real or personal property beyond a certain time. Every transfer of property in the District of Columbia to individual or corporation is prohibited which carries with it such conditions that the grantee cannot alienate it within the statutory period.

Gray in his work on Perpetuities, Sec. 629, says:

> "The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. Its object is

to defeat intention. Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provisions so construed the rule is to be remorselessly applied."

Such bequests have been passed upon many times by the courts and they have uniformly been declared void, both as violating the law against perpetuities and the law in restraint of alienation.

In New York, where the law in restraint of alienation is practically the same as in the District of Columbia, a testatrix provided in her will that a fund be set apart to be perpetually kept by the executors and trustees and their successors for cemetery purposes. Held, that the provision was void as an unlawful suspension of the absolute ownership of personal property.

(1891) Read *vs.* Williams, 125 N. Y., 560, 567.

A bequest of $200 was made to an executor to be expended within the time prescribed by the statute governing perpetuities in keeping a burial lot in good condition. Held to be void, because in violation of the statute forbidding a disposition of property in such a mode as to suspend the absolute ownership of personal property.

(1889) *In re* Fisher's Estate, 8 N. Y. Supp., 10.

A New York testator directed her executors to sell her real and personal estate and invest the proceeds in certain securities and pay the annual income perpetually to the "Lowville Academy." Held, that the trust was invalid as an unlawful perpetuity.

(1871) Adams *vs.* Perry, 43 N. Y., 487.

In California, where the law in restraint of alienation is similar to the law of the District of Columbia, a testator directed $2,000 to be invested and the income used for the purpose of keeping testator's burial lot in good order and proper condition. Held, that the provision was void as it created a perpetuity.

(1903) Estate of Gay, 138 Calif., 552–6.

Testatrix provided in her will for a monument at her grave and left a sum "to be kept in trust to beautify and keep it in good order." Held, a perpetuity and void.

(1883) Bates *vs.* Bates, 134 Mass., 110.

A bequest of a fund was made to be held in trust forever to expend the income as might be necessary to keep a lot in the burying ground in good order and condition. Held void as creating a perpetuity.

(1881) Piper *vs.* Moulton, 72 Maine, 155.

(1904) McIlvain *vs.* Hockaday (Texas), 81 S. W., 54.

(1901) Corle's Estate, 61 N. J. Eq., 409.

(1898) Sherman *vs.* Baker, 20 R. I., 446.

(1892) Kelly *vs.* Nichols, 17 R. I., 306.

(1893) Hartson *vs.* Elden, 50 N. J. Eq., 522.

(1891) Read *vs.* Williams, 125 N. Y., 560.

(1883) Coit *vs.* Comstock, 51 Conn., 352.

(1883) Fite *vs.* Beasley, 80 Tenn., 328.

(1883) Detwiller *vs.* Hartman, 37 N. J. Eq., 347.

(1881) Church Extension *vs.* Smith, 56 Md., 362.

Second Error.

The validity of the bequest and devise is to be determined by the laws of the District of Columbia.

The Court of Appeals in its opinion said it was fair to presume Congress recognized the well-established rule that "while the laws of the testator's domicile govern as to the formal requisites essential to the validity of the will, the capacity of the testator and the construction of the instrument, the validity of particular bequests depends (*unless expressly prohibited by the law of the testator's domicile*) upon the law of the domicile of the legatee." (R., 22.)

It is respectfully submitted that the learned court was in error not only as to the rule of law being well established and generally followed and which it presumed Congress recognized, but also as to the application of that law to this case, for three reasons: *First.* The validity of a devise of real estate depends upon the *lex loci rei sitae*, while a bequest of personal property depends upon the *lex domicilii*. *Second.* The validity of particular bequests does not depend upon law of domicile of legatee, except in particular instances. *Third.* The dispositions in this will fall within the expressed exception of the rule quoted, for they are positively prohibited by the law of testatrix's domicile.

First. The comprehensive and explicit language of Section 1023 of the Code leaves no doubt that Congress intended to inhibit every transfer of property that would in any manner offend its provision, whether the estate created was for domestic or foreign uses. It interdicts

both the power to dispose of, and the right to receive, property, and there can be no valid ground for the position that Congress meant the statute to be confined in its operation to the mere formal requisites essential to the valid execution of a will. The object Congress had in view was the absolute extermination of all estates raising perpetuities or restraining alienation, and the statute was directed at each and all instruments of title that did so, and it would be a forced and constrained construction to hold that such a statute could be avoided and set at naught and the very intent and language of the act frustrated by the bare fact of non-residence of a legatee. If such a strained construction would apply to wills, consistency would compel its application to deeds, yet there are no cases that hold that the validity of a deed depends upon the domicile of the grantee. The common law and the law in force throughout the States of the Union, except as modified by statute, are that *the validity of bequests depends upon the law of the testator's domicile*, and if Congress had desired to change this universal law or to make any exception thereto, it would have expressed its will in language that would permit no doubt or double construction.

This Court is authority for the position that the validity of a devise, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of a bequest, as against the next of kin, upon the law of the State in which the testatrix had her domicile.

(1882) Jones *vs.* Habersham, 107 U. S., 174-9.
(1844) Vidal *vs.* Girard, 2 How., 127.
(1849) Wheeler *vs.* Smith, 9 How., 55.
(1853) McDonough *vs.* Murdoch, 15 How., 367.
(1854) Fontain *vs.* Ravenel, 17 How., 369.
(1860) Perin *vs.* Carey, 24 How., 465.
(1867) Lorings *vs.* Marsh, 6 Wall., 337.
(1867) United States *vs.* Fox, 94 U. S., 315.
(1879) Kain *vs.* Gibboney, 101 U S., 362.
(1882) Russell *vs.* Allen, 107 U. S., 163.

"It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. * * * Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."

(1876) U. S. *vs.* Fox, 94 U. S., 315.

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

(1896) De Vaughn *vs.* Hutchinson, 165 U. S., 566, 570.

A testator domiciled in Wisconsin left a will directing his real and personal property in Wisconsin and other States to be sold and the proceeds invested in land in

Missouri. The trust was in violation of the law of Wisconsin as to restraints upon alienation, which law is the same as that in force in the District of Columbia. The court held that the will was void so far as the real estate in Wisconsin was concerned, saying:

> "The validity of every devise or disposition of real estate by will must be governed by the law of the place where the land is situated, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. * * * On the contrary, although not as well defined, nor as extensively enforced, yet the authorities clearly support the proposition that *the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicile at the time of his death, and this includes not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition;* and especially is this true where, as here, the testator's domicile at the time of making his will continues to be the same until the time of his death."
>
> (1887) Ford *vs.* Ford, 70 Wis., 19–44.

The rule is well settled in Massachusetts. A citizen of that State made a bequest in trust to a town in New York, and it was held upon full consideration that the bequest was valid, and that its validity was to be determined by the law of Massachusetts and not by the law of New York, where the trust was to be executed. Gray, Chief Justice, said:

"But the testator's domicile being in this Commonwealth, the question of the validity of his dispositions of his personal property, though to be executed elsewhere, is to be determined by the law of Massachusetts."

(1876) Fellows *vs.* Miner, 119 Mass., 541.

A testator, domiciled in Pennsylvania, ordered his executors to sell all his real estate in Virginia and Pennsylvania, and after payment of certain bequests, to give the residue to Winchester, Virginia, for the education of the poor. Judge Gray said:

"At the threshold of the discussion of these contentions, it is necessary to inquire what law is applicable to their determination, the law of Pennsylvania or the law of Virginia. As to this, we can do no better than to quote the language of the learned judge of the court below: '*It is clear that, as respects all of the testator's personal estate and his real estate situated in the State of Pennsylvania* (*he having devised real estate in Virginia, West Virginia and Pennsylvania,*) *the validity of the residuary clause is to be determined by the laws of Pennsylvania; the testator's domicile having been there at the date of his will and at the time of his death.*'"

(1900) Handley *vs.* Palmer, 103 Fed. Rep., 39–40.

A testator domiciled in Canada directed his executor to sell and convert all his estate, real and personal, into cash, and after payment of his debts to turn over the residue to the State of Vermont, in the United States, to be disposed of as it should deem best. Held, that although valid in Vermont, as the devise of real estate

contravened the statute of mortmain in force in Canada, that it was void.

(1880) Parkhurst *vs.* Roy, 7 Ontario Appeals, 618.

The validity of a trust as to real estate is to be determined by the law of its situs; as to personal property by the law of the domicile of the testator at the time of his death.

(1890) Penfield *vs.* Tower, 1 N. D., 216.

From considerations of justice and the principle of comity the dispositions of personal property is governed by the law of the domicile of the owner, and this rule has so general a sanction among all civilized nations that it may be treated as part of the *jus gentium*, and is part of the general law of every State in which it has not been abrogated by statute, either expressly or by necessary implication.

(1894) Whitney *vs.* Dodge, 105 Calif., 192.

The validity of a will of real property is to be determined by the laws and courts of the jurisdiction in which such real estate is situated and *not by any other law or by any other tribunal.*

(1898) Readman *vs.* Ferguson, 13 App. D. C., 60.

Second.—It is true that there are some cases (mostly in New York) that hold that the validity of bequests depends upon the law of the legatee's domicile, but it is submitted that the broad statement of the doctrine has been greatly modified and that the principle decided by them does not apply to the case at bar. There are two leading cases in New York that announce the above

proposition. In those cases it will be noticed, *first*, that the will directs the executor to pay over the entire fund to the foreign legatee, while in the case at bar no such direction is given, but the trustee is only to have the use of the income; *second*, that those trusts are for charity, while in the case at bar the trust is for a private purpose. In this connection it must constantly be borne in mind that charities are the favorites of the courts and that the public policy of New York is to allow its citizens free power to dispose of their personalty when it is to be taken to a foreign country and there administered for charity. The New York courts have by construction excepted charities from the operation of the State law, and Congress has adopted New York's benevolent view of the situation by embodying that exception in its statute.

One case is (1892) Hope *vs.* Brewer, 136 N. Y., 126, where a testator domiciled in New York directed his executors to convert all his property into cash and pay the proceeds to foreign trustees *to found and maintain a foreign charity.* The court said:

> "If personal property is disposed of by will, *and in trust for charity, to take effect in another country*, no good reason is apparent for insisting that a full compliance with the local law of the domicil, with respect to the form or duration of the trust, or the definition of the beneficiaries, is necessary to the validity of the disposition. * * * When a citizen of this State, or a person domiciled here, *makes a gift of personal estate to foreign trustees for the purpose of a foreign charity*, our courts will not

interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: *First*, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, *second*, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect. * * * In order to sustain this will, we must go a step further, and hold another, but a kindred, proposition, namely, that a disposition of personal property made in this State, by a competent testator, *in a valid testamentary instrument, to trustees in a foreign country, for the purposes of a charity to be established in that country*, is valid, although not in compliance with our statute or the rules of law in force here in regard to trusts and perpetuities, providing it is valid by the law of the place where the gift is to take effect, and which governs the trustees and the property when transmitted there."

Until it is shown that the laws and public policy of New York and the District of Columbia are identical this decision can have no force in this jurisdiction as it is made very plain that it was influenced by a public policy peculiar to New York, for the court, continuing its opinion, said:

"The law of this State inhibiting the creation of trusts not expressly authorized by statute and the suspension of the power of alienation of real estate and the absolute ownership of personal property, *is founded upon a public policy of our own.*"

The other case is (1871) Chamberlain *vs.* Chamberlain, 43 N. Y., 424, where a testator domiciled in New York directed one-half of his residuary fund to be paid to *a foreign corporation for charitable purposes.* A bill was filed by the heirs at law for construction. The court said:

> "*Bequests in aid of foreign charities*, valid and legal, in the place of their existence, will be supported by the courts of the State in which the bequests are made."

And in this case as in the other, the public policy of New York was a controlling factor leading to the conclusion of the Court, for it said: "*But so far as the validity of bequests depends upon the general law and policy of the State* affecting property and its acquisition generally, and relating to its accumulation and the suspension of ownership and the power of alienation, *each State is sovereign as to all property within its territory*, whether real or personal." In both of these cases the property is personalty, while in the case at bar the property is realty and personalty. One of the requisites for the application of the law announced in one case is that the disposition must be made by "valid testamentary instrument," and in the other that the will must have "all the forms and requisites to pass title." But the case at bar does not possess either essential, for the will, instead of being a "valid testamentary instrument," is absolutely void under Section 1023 of the Code, and that being true, it does not possess the "requisites to pass title."

Even in (1852) Vansant *vs.* Roberts, 3 Maryland, 119,

cited in the Chamberlain case (*supra*), the court restricted its observation on the point *to trustees in trust for charity and to a foreign corporation for purposes of charity.* And in the State of Maryland at that time there was no law in restraint of alienation or any prohibitive act like Section 1023.

In (1905) Robb *vs.* Washington and Jefferson College, 103 App. Div., N. Y., 327, where a New York testator left certain securities to a foreign corporation for educational purposes, upon a bill filed to have a legacy declared illegal, the court, after discussing the authorities bearing upon the question, summed up its conclusion by saying:

> "It has already been shown that *a gift or devise to a charitable corporation is not within the laws of New York prohibiting perpetuities.*"

In (1898) Congregational Society *vs.* Hale, 29 App. Div., N. Y., 396, the question was whether a bequest to a trustee of a foreign corporation to use the income to keep a cemetery lot in repair and the balance toward support of preaching the gospel was legal. It was held that the former was invalid under the laws of Massachusetts, but that the latter was valid as a bequest *for a foreign charity.*

The court recognized that the rule was confined to charities in (1888) Holland *vs.* Alcock, 108 N. Y., 337, where the question was as stated by the court, "whether the grantor or devisor of *a fund designed for charity*, is competent to give; and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift."

The best evidence that the New York decisions on this subject are confined to cases of foreign charities is (1892) Cross *vs.* U. S. Trust Co., 131 N. Y., 330. There a testatrix in Rhode Island left bonds in trust to a New York corporation to pay over income to husband and children. The trust was valid at domicile, but invalid in New York, where the property and trustees were and where the trust was to be administered. On the theory that the validity of particular bequests depends upon the domicile of the legatee, the heirs at law sought in New York to have the bequest declared void under its laws. The court said:

> It can, therefore, be safely asserted that there is no controlling authority in this State in support of the proposition that the validity of bequests in foreign wills may be tested by some other law than that which governs the will in other respects, or that requires us to disregard the disposition made of the fund in this case under the law of another State. * * * A rule which prescribes the formal requisites and construction of a will, and the testator's capacity, are to be determined by the laws of one State, and the validity of his dispositions of personal property, by the laws of some other State or country, *would be exceedingly inconvenient and uncertain, and no sound principle or decisive authority requires us to sanction it. All these questions should be determined by the same law.*"

In the last case the court said that when Judge Allen decided in the Chamberlain case (*supra*) that the validity of a particular bequest would depend upon the law of

the domicile of the legatee that he had reference to the capacity of the legatee to take.

But the doctrine in the two leading cases is further substantially restricted. In the Chamberlain case the court said that the validity of particular bequests also depends upon the law "of the government to which the fund is, by the terms of the will, to be transmitted for administration;" while in the Hope-Brewer case it declares such a bequest valid "provided it is valid by the law of the place where the gift is to take effect, and which governs the trustee and the property when transmitted there." And this enunciation of the meaning of the principle makes it pertinent to inquire whether the trust fund in this case is to be administered in the District of Columbia or is it to be transmitted to the State of New York; in other words, are the executors under the will, or the Greenwood Cemetery Company, made the trustee of the fund and charged with the duty of making the investments and turning over the income to be used for cemetery purposes.

The will by the first and twelfth paragraphs raises two trusts: first, the real estate to be held for the use of the Igleharts during their lives; second, the proceeds of the sale of the real estate and the residue of personal property to be invested in securities, the income therefrom to be used by the Greenwood Cemetery Company. The Cemetery Company was specifically named trustee for the former. No trustee was designated for the latter.

It will be noticed that the will not only does not name a trustee to carry out the objects of the second trust, but

it negatives the idea that the Greenwood Cemetery Company was to do so by directing it to use, not invest, the income "as trustees." It is apparent from the language of the will that the testatrix did not intend the Cemetery Company to make the investment in United States securities, hold the same as trustee, and pay over the income to itself to "be used" as trustee. The intention was that this fund should be invested by the executors, the income therefrom to be paid by them to the Cemetery Company and by it "used" as trustee. This construction is in accord with the law that where a will raises a trust without naming the trustee that the executor shall execute the trust. Thus in the case of (1889) Mitchell *vs.* Thompson, 18 District of Columbia, 130, a testator made his debtor his executor, and directed that the money due from him be invested in land for the use of another; it was held that the executor was charged with the duty of making the investment, as no other person was named.

This seems to be the settled law on this point.

(1878) McBurney *vs.* Carson, 99 U. S., 567–72.
(1879) Richardson *vs.* Knight, 69 Me., 285.
(1872) Pettingill *vs.* Pettingill, 60 Me., 11.
(1860) Holbrook *vs.* Harrington, 16 Gray, 102.

Third.—The case cited by the Court of Appeals excepts from its broad sweep (*a*) bequests expressly prohibited by the law of the testator's domicile, or (*b*) in contravention of its public policy. The case at bar falls within both exceptions stated, for Sec. 1023 of the Code

expressly prohibits the creation of such estates as this will attempts to raise; and whatever the law condemns is against the public policy of the State.

(*a*) In the Chamberlain case (*supra*), on which authority the case cited in the opinion of the Court of Appeals rests, the court said:

> "*If the law of the testator's domicile, in terms, forbids bequests for any particular purpose, or in any other way limit the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere.* But so far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation and a suspension of ownership and the power of alienation, *each State is sovereign as to all property within its territory, whether real or personal.*"

In (1891) the matter of Huss, 126 N. Y., 537, the court, in passing upon the validity of a gift and announcing the rule, noted as an essential element *that the laws of New York did not prohibit the bequest.*

In (1898) Congregational Society *vs.* Hale, 29 App. Div. N. Y., 396, the court said:

> "It is well settled in this State, * * * that the validity of particular bequests depends (*unless expressly prohibited by the law of testator's domicile*) upon the law of the domicile of the legatee."

Hill on Trustees, an authority relied on by the court in the Chamberlain case (*supra*), at Section 454, says *that*

a trust for a foreign charitable purpose cannot be supported here, *if it contravenes the policy of the English law*, although it may not be illegal according to the laws of the State where the charity is to be established.

The Appellate Court seems to have completely ignored the positive inhibition of Section 1023, and contented itself with saying that it scarcely seems possible that Congress intended to be so narrow as would be the case if Section 1023 were literally enforced. But the courts cannot disregard the voice of the legislature in such a way. When its will is expressed in words of plain import the court is bound to conform its action to their meaning and cannot refuse to give them effect, because it seems such a course would be narrow, unreasonable, or work a great hardship. When language of a statute is explicit there is great danger in the court's departing from the words used to give an effect to the law which it may suppose to have been designed by the legislature. It is not for the court to say where the language of a statute is clear that it shall be so construed as to embrace other cases, because no good reason can be assigned, or the court fails to see, why they were excluded from its provision. (1836) Denn *vs.* Reid, 10 Peters, 524. The courts have no function of legislation and simply seek to ascertain the will of the legislator, and no mere omission, no mere failure to provide for contingencies, which may seem wise to have been specifically provided for, justify any judicial addition to the letter of the statute. (1897) U. S. *vs.* Goldenberg, 168 U. S., 95, 102. It is the duty of courts in the interpretation of statutes to declare the

law as it is; and the interests of society are best subserved by a close adherence by courts to what they find to be the plain meaning, neither narrowing the application on the one hand, nor extending the meaning on the other, to meet cases not specified which may seem to be within the reason of the law. (1893) Matter of Estate of Prime, 136 N. Y., 347.

When Congress says "every estate," there is no power in the courts, if they correctly interpret the statute, to except from its operation estates devised to foreign corporations, thereby substituting the word "some" for "every." If Congress had intended that this statute should not apply to foreign corporations, it would have said so; but instead of doing this it has said "every," and this word of universality embraces both domestic and foreign corporations. The case at bar is not unlike (1896) U. S. *vs.* Freight Association, 166 U. S., 290, and the reasoning there applies with peculiar force here. There the question was whether an act of Congress providing that "every contract * * * in restraint of trade or commerce * * * is hereby declared to be illegal" applied to and covered common carriers by railroad. It was contended that the statute was not really intended to reach an agreement between competing common carriers, but only corporations engaged in the manufacture or sale of articles of commerce. The court said that the terms of the act do not bear out such a construction. That the language of the act includes *every* contract, and any contract in restraint of trade is by the strict language of the act prohibited; and that there is

no escape from the conclusion that if any agreement in restraint of trade does restrain it, that the agreement is condemned by the act. That it cannot be seen how the statute can be limited without reading into its text an exception which alters the natural meaning of the language used upon a most material point. That no exception or limitation can be added without placing in the act that which has been omitted by Congress.

(*b*) There can be no better indication of the attitude of Congress toward foreign cemetery corporations taking property for perpetual uses than the positive and express prohibitory clause in Section 1023 of the Code, and the rule of law is that whatever the statute condemns or prohibits is against the public policy of the State.

(1884) Hollis *vs.* Drew Theo. Sem., 95 N. Y., 166–72.

Some very positive expressions are found on this subject in the recent case of (1896) U. S. *vs.* Freight Association, 166 U. S., 340, where the court said:

> "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

In (1890) St. Paul Railway Co. *vs.* Phelps, 137 U. S., 536, the court said:

> "Where a statute is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government."

Again, in (1866) Hadden *vs.* The Collector, 5 Wallace, 111, the court said that—

> "What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

The Court of Appeals desires to go beyond the record and look to conditions which it supposes prevail in the District and from them ascertain the public policy. For instance, the court is of the opinion that in determining the public policy of the District towards foreign cemetery associations that the fact should be considered that so many of its people come from other localities, or are the descendants of those from other localities, and while passing their lives here expect upon death to be laid in cemeteries located outside of the District and which are not incorporated under its laws. And further, that in interpreting the laws of the District of Columbia on this subject that significance should be attached to the fact that they are enacted by Congress representing all parts of our common country (R., 23). Just what weight and

consideration should be given to such speculations and conceptions in defining a State's public policy or in interpreting the laws of its legislature it is difficult to determine. But it is certain that such theories are not in harmony with expressions of this court.

The appellate court said that it could not be successfully contended that whatever the District of Columbia p rmits to its own corporations is so far against its publi policy that it will not permit the same privileges to a foreign corporation (R., 22). Thus the court attempts to gauge the public policy of the District of Columbia towards foreign corporations by the statute enacted for the organization and management of its domestic corporations. Such standard is not only based on false reckoning, but it is condemned by the courts, hazardous and uncertain in its results, and is not the law. In (1894) Vanderpoel *vs.* Gorman, 140 N. Y., 563, where it was urged that a public policy as to foreign corporations was to be found in a statute, even though its terms applied only to domestic corporations, Mr. Justice Peckham said, that the difference between domestic and foreign corporations are so marked that a statute regarding domestic corporations can furnish no proof as to the existence of public policy, which, in the case of foreign corporations, should stand in the place of, and be equivalent to, that statute.

The Court of Appeals in the case at bar said:

> "It scarcely seems possible that Congress intended to be so narrow as would be the case if it intended, in permitting cemeteries incorporated

> under the laws of the District to take and hold property for the purpose specified, to refuse to recognize a like right in similar companies incorporated under the laws of the various States where a like privilege is granted." (R., 22.)

The effect of the court's reasoning is to carve out another exception from the general prohibition of Section 1023 in favor of foreign cemetery companies. If the court has the power to do that and to except such corporations, it has the further right to accept all foreign corporations, and then individuals, and so nullify the law entirely. In the case of (1896) U. S. *vs.* Freight Association, 166 U. S., 340, the same theory was advanced by counsel that seems to have been entertained by the Court of Appeals in this case. There it was contended that although the language of the statute of prohibition included all contracts in restraint of trade, yet it must be presumed that Congress could not have intended to embrace all contracts, but only such contracts as were in *unreasonable* restraint of trade. The court said:

> "Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keeps rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be

supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act· itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These consideration are, however, not for us. If the act ought to read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable."

Third Error.

Even though there is equitable conversion from realty to personalty, yet the bequests will nevertheless fall within the prohibition of the statute.

The lower courts were of the opinion that as the property was converted into personalty under the terms of the will that the law in restraint of alienation did not apply to the case as strictly as if it had been realty. The equity court said, so far as the converted proceeds are concerned, the District of Columbia manifestly cannot be interested, whether or not a perpetuity is created; while the Court of Appeals said:

"The real estate being once converted into personalty, it matters even less than in the case of real estate to the District of Columbia whether such

> property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses." (R., 23.)

But these positions are met and refuted by the provisions of the law itself, which puts the matter beyond argument. A general clause of the subchapter of the Code, which contains Sec. 1023, provides:

> "All the provisions of this subchapter shall apply to personal property generally, except where from the nature of the property they are inapplicable."

Therefore it does not relieve the situation to say that there is an equitable conversion to personalty resulting from the direction of sale in the will, and that this law does not apply to personalty. The doctrine of conversion cannot circumvent the prohibition of the statute when the resultant proceeds wear the same fetters as restrained the alienation of the land.

(1889) Cruikshank *vs.* Home, 113 N. Y., 337, 352.

The law of California (the same as in the District of Columbia) against suspension of the power of alienation applies to personal as well as to real estate, it being in that part of the Code dealing with modification of ownership and restraints on alienation of property in general.

(1895) *In re* Walkerly, 108 Calif., 627.

If a trust be created, by which the possession of personal property and the legal estate therein is vested in the trustees during the continuance of the trust, an absolute ownership of personal property is suspended within

the meaning of the statute, the absolute ownership of personal property being suspended by the creation of a trust in the same manner as alienation of real estate.

(1891) Underwood *vs.* Curtis, 127 N. Y., 537.

In North Dakota where the statute is the same as in District of Columbia, the court said that the power to change the trust property from real to personal estate will not save the trust from the condemnation of the statute. The validity of a trust of converted personalty is to be determined by laws of testator's domicile.

(1890) Penfield *vs.* Tower, 1 N. D., 216.

Though executors are directed to sell real property and convert it into money, and actually make such sale, the proceeds are not thereby converted into personalty, if the purpose for which the sale was directed to be made is one not permitted by law.

(1897) Fifield *vs.* Van Wyck, 94 Va., 557.

Where a will directs the conversion of realty into personalty for a particular but void purpose, the doctrine of equitable conversion does not apply; but unless otherwise clearly indicated by such will such realty will pass to the heirs as property undisposed of thereby.

(1900) Harrington *vs.* Pier, 105 Wis., 485.

If a conversion is directed for a particular but void purpose, the doctrine of equitable conversion does not apply.

(1891) Read *vs.* Williams, 125 N. Y., 560.

Fourth Error.

The doctrine of comity has no application, because to recognize the foreign cemetery company would violate the settled policy of the District of Columbia distinctly marked by Congressional legislation.

By section six of the Greenwood Cemetery Company's charter, it is permitted to take any bequest upon trust to apply the income to the care and preservation of any cemetery lot according to the terms of the grant. (R. 9.)

The general law of the District of Columbia, regulating the formation and government of cemetery associations and conferring upon them certain rights and privileges, is found in the Code of the District of Columbia in Chapter 18, subchapter 6, and provides for their incorporation, powers, officers, election, by-laws, exemption from taxes, dedication of land, location, lots and plats, place and mode of burial, and prosecutions for violation of the law. Section 669 of said subchapter provides as follows:

> "SEC. 669.—*Grants and Bequests for Care of Lots.*—It shall be lawful for such association to take and hold any grant, donation, or bequest, upon trust to apply the income thereof, * * * for the preservation * * * of any tomb * * * according to the terms of such grant, donation, or bequest; *and the Supreme Court of the District of Columbia shall have full power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose.*"

It was contended by opposing counsel in the courts below that as the statute in force in the District of Columbia favored bequests to domestic cemetery companies, and contained no prohibition against foreign cemetery associations, that comity required the will to be sustained. This view seems to have been adopted by the Court of Appeals (R., 22). Two cases of this court are cited as authority for this position.

The first is (1879) Cowell *vs.* Springs Co., 100 U. S., 55, where it was claimed that as a general statute of Colorado authorized the creation of corporations only for mining, manufacturing, and other industrial pursuits, that all foreign corporations not chartered to do business of this nature were prohibited from the exercise of their charter powers in that Territory; and if domestic corporations could not be created with such powers, for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The court said the position was answered by *general comity, which in the absence of positive direction to the contrary, obtains throughout the States.* That the policy of the State cannot be inferred from the fact that the legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law, but that such policy must be expressed in some affirmative way.

The other case is (1879) Christian Union *vs.* Yount, 101 U. S., 352. It was contended that by the settled law of Illinois a foreign corporation could not hold lands in that State. But the Court held that there was no such

settled law in that State, and in the absence of direct legislation on the subject that the presumption should be indulged that a corporation of one State, not forbidden by the laws of its being, may exercise within any other State the general powers conferred by its own charter, *unless prohibited from so doing, either in direct enactments of the State or by the public policy to be deduced from the general course of legislation or from the settled adjudications of its highest courts.*

The two cases apply with peculiar force to the case at bar. But court and counsel have misconceived their application. It is not maintained that the public policy of the District of Columbia as to foreign cemetery corporations can be inferred from the fact that Congress has made no provision for the formation of similar corporations, as held in the first case; nor that the presumption should not be indulged in favor of the Greenwood Cemetery Company's exercise of its corporate rights in the District of Columbia, as held in the other. But conceding both the inference and presumption, it is strenuously urged that when Congress by Section 1023 declared every future estate void in its creation that should suspend the absolute power of alienation, such language rebuts the aforesaid inference and presumption. The terms of the statute embrace every estate bequeathed or devised for a perpetual purpose, whether to domestic or foreign corporations, and it is an announcement of the public policy of the District of Columbia toward foreign corporations prohibiting them from taking such estates. Such a public policy is in the words of the decisions

"not only deduced from the general course of legislation," but is "expressed in some affirmative way."

In this connection it may be noticed that the Court of Appeals cites no authority for its position, but depends on inference, supposition and its own reasoning for the conclusion it reaches. It is therefore safe to infer that the District of Columbia has no public policy as to the recognition of foreign cemetery associations that has ever been indicated, either directly or indirectly, by act of Congress or by the adjudications of its highest court. This branch of the case can best be determined by ascertaining: *First*, what is comity? *second*, what tribunal establishes the State's public policy? *third*, to what limits should it be carried?

First. Comity means general reciprocity, and yields as a favor what cannot be claimed as a right. It persuades, but does not command, and its obligation is not imperative. It is the recognition which one State allows within its territory to the legislative, executive, or judicial acts of another State, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. (1894) Hilton *vs.* Guyot, 159 U. S., 113–164. Comity is not a rule of law, but one of practice, convenience, and expediency. (1899) Mast *vs.* Stover, 177 U. S., 488.

Second. Recognition of foreign corporations is not a public policy to be established by the courts. It would be a bold claim for anyone to make that the courts, in the enforcement of a supposed public policy, could apply

any limitation to the numerous domestic corporations to which the statute law had not applied it, and no more can it be applied to foreign corporations without the sanction of law. (1884) Hollis *vs.* Drew Theo. Sem., 95 N. Y., 176.) Comity is the comity of States, and not the comity of courts. (Thompson on Corporations, Sec. 7884). The power of determining whether and how far, or with what modification, or upon what conditions, the law of one State or of any rights dependent upon them, shall be recognized in another, is a legislative one; and the judiciary must be guided in deciding the question upon the principle and policy adopted by the legislature. (1872) Thompson *vs.* Waters, 25 Mich., 214. Every nation must be the final judge for itself, not only of the nature and extent of the duty (of comity), but of the occasions on which its exercise may be justly demanded. (Story's Conflict of Laws, Secs. 33–8.) It is the legislative and not the judicial power of the State that must control and give shape to its public policy and apply it to cases that arise, and this public policy must be determined by reference to its general legislation, either by prohibitory or enabling acts or by its general course of legislation on the given subject. (1873) Carroll *vs.* St. Louis, 67 Ill., 568.

Third.—The courts seem to be of one accord that comity will not be extended when to do so would violate the public policy as indicated by statute. Comity gives way where the established policy of the legislature indicates to its courts a different rule. (1888) Walworth *vs.* Harris, 129 U. S., 364. Comity does not permit the exercise of a power by a corporation when the policy of

that State, distinctly marked by legislative enactment or constitutional provision, forbids it. (1853) McDonogh *vs.* Murdoch, 15 How., 113. (1868) Paul *vs.* Virginia, 8 Wallace, 168–81. Courts out of comity will enforce the law of another State, when by such enforcement *they will not violate their own laws or inflict an injury on some one of their citizens*, as these courtesies are extended when they are not prevented by some positive law of the State. (1895) Franzen *vs.* Zimmer, 35 N. Y. Supp., 612. Mere comity can never compel courts to give effect to laws of another State which directly conflict with the laws of their own State and are contrary to its known public policy. Wharton on Conflict of Laws, Sec. 598.

Fifth Error.

A State statute granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply to domestic corporations only.

The Court of Appeals did not recognize this law as applicable to this case. But the intention of Congress to confine Sec. 669 to domestic corporations is clearly indicated in two ways. *First.* By the apt words of the statute. *Second.* By the natural deduction that a sovereign power intends to confer privileges only upon corporate bodies formed under its laws.

First. The local nature of this statute is shown not only by the words of the Section 669 that "it shall be lawful for *such* associations" (meaning only associations organized under the general act) "to take and hold any grant, etc.," but by the further provisions providing for the

number of the corporation's officers, their respective duties, elections, and who shall constitute the voters. These matters of corporate administration fall peculiarly within the province of the sovereign power granting the charter and, therefore, Congress would not attempt to prescribe them for a foreign corporation.

But the intention of Congress to restrict to domestic corporations such privileges is especially emphasized by the last clause of Sec. 669, which confers upon the Supreme Court of the District of Columbia jurisdiction to enforce such bequests at the instance of a lot owner. Clearly this remedy could not be pursued against a foreign cemetery corporation which had no habitat in the District of Columbia. That court could not compel the "due performance of this trust" by the Greenwood Cemetery upon a bill filed in the District of Columbia by a lot owner. Should this money be turned over to the Greenwood Cemetery Company, it would then be taken beyond the limits of the District of Columbia and the company would not be required under the law to give bond for the performance of its duties as trustee. The corporation would be accountable in the courts of the District of Columbia to no one for failure of performance, for manner of performance, or for any breach of trust whatever. This law was framed to prevent just such a condition from arising as exists in this case by restricting the privilege of taking bequests for perpetual purposes to domestic corporations over which the local courts have jurisdiction and exercise powers of visitation and control. It would not be within the scope of a just

and enlightened public policy to allow trust funds to be received by a foreign corporation under a will invalid in the District of Columbia, and even less so to permit them to be carried to another jurisdiction and there appropriated to whatsoever use it pleases without let or hindrance, while the domestic corporations are answerable to laws requiring strict accountability.

Second. The best considered authorities are not in accord with the Court of Appeals on this point, and they reason that a sovereign power in bestowing privileges upon its domestic corporations assumes certain responsibility of visitation in connection with the exercise of those privileges, which responsibility in the nature of things could not attach to foreign corporations. A few cases will be referred to.

In (1876) United States *vs.* Fox, 94 U. S., 315–21, a statute provided that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The court said the term *corporation* in the statute applied only to such corporations as are created under the laws of the State.

A testator domiciled in New Jersey gave two funds of $5,000 each to two cemetery companies, one in New Jersey and one in Maine, and directed that the income be used to perpetually keep certain graves therein in repair. The executor filed a bill for the construction of the will and the heirs at law contended that the bequests were void, because they were indefinite and vague, and the will created a perpetuity for uses not

charitable. New Jersey has a statute almost identical with that of the District of Columbia that permits cemetery associations incorporated under its general statute to take and hold property for preservation and repair of graves and monuments. The court held that as the bequest for the local cemetery association came within the provisions of the State statute it was valid, but speaking of the bequest to the foreign cemetery association, said:

> "In attempting to apply this statute to the present case, it is, in the first place, perceived that the Buxton Cemetery Company is a corporation of another State, and, therefore, not within the protection of the legislation. The law is applicable only to certain cemetery companies created by or under the laws of this State and cannot avail the Buxton Cemetery Company."
>
> (1892) Hartson vs. Elden, 50 N. J. Eq., 522.

A statute provided that "any religious, educational * * * or charitable corporation, or corporation organized for * * * other than business purposes" should have the right to acquire and hold property. The act further provided "the personal estate of such corporations shall be exempt from taxation." It was contended that this exemption extended to all charitable and religious corporations, foreign or domestic, whether created by the laws of New York, or the laws of any other State or government. The Court said:

> "It seems very plain that the purpose of the act of 1889, and of the amending act of 1890, was to regulate and define the corporate powers and priv-

ileges of domestic corporations only. They are acts conferring and regulating corporate capacity and privileges. * * * We are of the opinion that a statute of a State granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the State and over which it has the power of visitation and control. Such is the natural interpretation of such legislation, in the absence of a contrary intention appearing on the face of the act. The legislature, in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control."

(1893) Matter of Estate of Prime, 136 N. Y., 347, 59, 60.

In (1894) Vanderpoel *vs.* Gorman, 140 N. Y., 563–71, a New York statute provided that "No corporation shall make any transfer or assignments to any person whatever in contemplation of its insolvency, and every such assignment is declared void." It was claimed that foreign corporations were embraced in the general language of the prohibition but the court said they were not, and arrived at its opinion by reference to the whole act; and, from a perusal of the general provisions, the court thought it was clear that they were designed for the government and regulation of corporations created by that State. That the language was neither apt nor pertinent when applied to foreign corporations, but that it was both appropriate and pertinent when applied to domestic corporations.

In (1871) White *vs.* Howard, 46 N. Y., 144–65, a statute provided that "no devise to a corporation shall

be valid, unless such corporation by its charter or statute, be expressly authorized to take." It was contended that this law should be construed to include foreign corporations. The court said:

> "It is equally clear that such charters only were intended as were granted by a statute of this State, or organized under a general statute of the State, as it is that by the words 'by statute,' a statute of the State was intended. Any other construction would work a complete revolution of the policy of the State."

In (1894) Matter of Balleis, 144 N. Y., 132, the provision of the Transfer Tax Act exempting "any property hereafter devised or bequeathed * * * to any religious corporation" was held to apply only to domestic corporations of the character specified, and that it did not exempt religious corporations of other States.

In (1897) Whitcomb *vs.* Robbins, 69 Vt., 477, a statute was passed conferring the right of petition for insolvency upon corporations "created under the laws of the State." The quoted section was afterwards repealed. It was then contended that by the use of the word "corporation" unmodified that the right was thereby extended to foreign corporations. The court said:

> "We do not construe the law to confer benefits upon *foreign* corporations."

In (1892) Falls *vs.* U. S. Savings Asso., 97 Ala., 417, a statute provided that "No person, bank, corporation, or association of persons, *except building and loan associa-*

tions, shall demand or stipulate a greater rate of interest than ten per cent."

It was contended that foreign building and loan associations came within the exception. Held, that the exception referred only to domestic associations.

In (1876) Holbert *vs.* St. Louis R. R. Co., 45 Iowa, 23–6, a statute that "Any railroad corporation in this State heretofore organized under the laws of this State, or that may hereafter be organized, may take and hold * * * so much real estate as may be necessary for the location, construction, and convenient use of their road." A foreign corporation claimed that it was included in this statute by construction. The court said:

> "The right is conferred upon corporations organized under the laws of this State, and is, by necessary implication, denied to foreign corporations."

In (1889) South Yuba *vs.* Rosa, 80 Calif., 333, a statute providing that "every corporation now in existence" should file a copy of its charter in the office of the clerk where its property is located" was held to apply to domestic and not to foreign corporations.

In (1890) Rumbaugh *vs.* Improvement Co., 106 N. C., 461, a statute requiring "every contract of every corporation to be in writing" was held not to apply to foreign corporations.

In (1884) Hollis *vs.* Drew Theological Seminary, 95 New York, 166, the question was, whether the two months' limitation prohibiting bequests to "any corporation formed under this act" applied to a foreign corporation? It was held that it did not; (1) because the prohibition

was confined to bequests to corporations organized und er the act; and (2) that no public policy existed which required its extension to bequests to foreign corporations.

Sixth Error.

Section 669 of the Code, being inconsistent with Section 1023 and irreconcilable, the former is absolutely void.

These two sections were passed by Congress at the same time. The former confers upon domestic cemetery associations the right to take property for perpetual uses. The latter absolutely prohibits the raising of such estate for any perpetual purpose except for charity. The two statutes cannot stand together. If domestic cemetery associations are permitted to take property under Section 669, then both the letter and the spirit of Section 1023 are violated and an additional exception is placed in the statute, and that will permit something to be done that the statute has positively forbidden. Prohibiting statutes are not interpreted on a principle of leniency, and it is a well known rule of construction that where a general prohibitory statute is modified by an exception, that even that exception is construed strictly and extended to cover only such matters as its words will warrant.

The two sections cannot be harmonized, and the authorities on statutory construction say that where there is an irreconcilable conflict in different sections of a code or of parts of the same act, that the last in order of arrangement must prevail.

Sutherland's Statutory Construction, Sec. 268.

26 Am. & Eng. Ency. of Law, Sec. 619.

(1902) Hand *vs.* Stapleton, 135 Ala., 156-62.

At the time Sections 669 and 1023 were passed, another section intending to have a harmonizing effect upon these sections was also passed, viz:

> "SEC. 1624.—*Perpetuities.*—No will, testament, or codicil shall be effectual to create any interest in perpetuity, or make any limitation, or appoint any uses, except as permitted by this Code."

On June 30, 1902, six months after the Code went into effect, Section 1624 was repealed and stricken out by Congress in an Act to amend an Act entitled "An Act to establish a code of law for the District of Columbia." Thus it seems that Congress was aware of some inconsisterces on this subject when the Code was originally passed, but subsequently repealed the harmonizing section and thus intentionally left the other two sections in an antagonistic condition.

Seventh Error.

The will embodied one entire scheme composed of two interdependent parts: (a) The erection of a monument; (b) its care and preservation. If the latter is invalid, the former must fall with it.

Looking at the four corners of the will it is manifest that the testatrix had but one end in view, viz: that her whole estate should be expended in the Greenwood Cemetery, one-half going towards the erection of a monument at the grave of her husband and the other half to the preservation of the monument and the lot where it was to be located. (R., 5–6.) Just how important she considered these two bequests may be

judged from the fact that they were the first to receive her attention and the last to have her care. As they are so nearly identified and closely entwined, can the court say that they can be practically separated, and that even if one is found invalid, the other should be executed? The question arises had the testatrix known that the provisions for the preservation of the lot and monument were void, would she have directed the erection of the monument? She has so inherently combined them that they cannot be torn asunder without maiming the general frame of the will and thwarting the testatrix's substantial and dominant purpose.

The rule is that if some of the trusts embodied in a will are valid and some invalid, if they are so taken together as to constitute an entire scheme so that the presumed wishes of the testator would be defeated if one portion was retained and the other portions rejected, then all the trust must be construed together, and all must be held illegal and fall.

(1891) Tilden *vs.* Green, 130 N. Y., 29–50.
(1896) Lawrence *vs.* Smith, 163 Ill., 149–65.
(1895) *In re* Walkerly, 108 Calif., 627–44.
(1892) Matter of will of Butterfield, 133 N. Y., 473–6.
(1873) Holmes *vs.* Mead, 52 N. Y., 332–45.
(1872) Knox *vs.* Jones, 47 N. Y., 389–98.

It is respectfully submitted that the lower court should be reversed.

ANDREW WILSON,
NOEL W. BARKSDALE,
Attorneys for Appellants.

FILE COPY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U.
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No. 158.

HENRY F. IGLEHART AND MARY I. POLK,
APPELLANTS,

vs.

J. HOWARD IGLEHART, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ANNIE E. I. ANDREWS, DECEASED, APPELLEE.

Brief for the Appellee and for the Greenwood Cemetery.

WALTER V. R. BERRY,
BENJAMIN S. MINOR,
HUGH B. ROWLAND,
Attorneys for the Greenwood Cemetery.

CHAS. H. STANLEY,
Attorney for Executor, Appellee.

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Statement of the Case.

Annie E. I. Iglehart, a resident of the District of Columbia, died April 21, 1903, unmarried, and without issue, possessed of personal property and real estate situated in the District of Columbia, and leaving a will. This will was admitted to probate and letters testamentary issued. The executor filed a bill for the construction of the will. The heirs at law and next of kin contend that clauses 1, 10, and 12 are invalid. This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming the decree below declaring the will valid.

The appellants in this court are two of the heirs at law and next of kin who were parties defendant to the

bill filed by the executor for the construction of the will, an order having been passed allowing them to sever from their codefendants, and to prosecute this appeal.

The case was heard below upon the pleadings and an agreed statement of facts (Rec., p. 14).

Three paragraphs of the will are involved in this cause, the remainder of the will consisting of specific bequests to relatives and friends, about which there is no controversy. The will is set out in full on pages 5 and 6 of the record. The three paragraphs in dispute are as follows:

> "First. I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M street northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them, provided they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition."
>
> "Tenth. It is my will, and I order and direct that five thousand dollars be raised out of my estate to be expended in erecting a suitable monument at the grave of my dearly beloved husband, E. L. Andrews, in Greenwood Cemetery, Brooklyn, New York."
>
> "Twelfth. It is my will, and I order and direct that all the rest and residue of my estate, real,

personal and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause 1 of this my last will, for the purpose and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery lot in perpetual good order and condition."

Appellants' Assignments of Error.

The court below erred:

1. In sustaining the validity of the devise of real estate to the Greenwood Cemetery Company.

2. In upholding the residuary bequest to the Greenwood Cemetery Company.

3. In directing the erection of the monument provided for in paragraph ten.

ARGUMENT.

I.

Under the statutes in force in the District of Columbia and in the State of New York, and under the general doctrine of comity obtaining among the States, clauses ONE and TWELVE of the will are valid.

Even assuming that, *under the common law*, clauses one and twelve would create perpetuities, yet so far as the case at bar is concerned, this has been changed by statute. The appellants' extended argument on the subject of perpetuities and the cases cited thereon, which declare bequests and devises in trust for the care, etc.,

of burial lots invalid, have no bearing whatever on the present case. This is made clear by reading the law in force in the District of Columbia and the law in force in the State of New York.

The law of the District of Columbia permits cemetery associations incorporated under its laws to take real and personal property under trusts for the care, etc., of lots. It reads as follows:

> "Sec. 669. Grants and Bequests for Care of Lots.—It shall be lawful for such association to take and hold any grant, donation or bequest, upon trust to apply the income thereof, under the direction of the board of managers, for the embellishment, preservation, renewal or repair of any tomb, monument, gravestone or other structure, fence, railing or other inclosure in or around any cemetery lot, or for the planting and cultivation of any trees, shrubs, flowers, or plants in or around any cemetery lot, according to the terms of such grant, donation or bequest; and the Supreme Court of the District of Columbia shall have full power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose."
>
> D. C. Code, chap. XVIII, sub-chap. VI (Cemetery Associations), sec. 669.

The law of the State of New York permits the Greenwood Cemetery to take real and personal property under similar trusts. It is as follows:

> "Sec. 6. The said corporation may take and hold any grant, donation, or bequest of property upon trust to apply the same or the income thereof, under the direction of the board of trustees, for the improvement or embellishment of the said cemetery, or for the erection, repair, preservation, or renewal of any tomb, monument, or gravestone, fence, railing, or other erection, or for the planting and cultivation of trees, shrubs,

flowers, or plants in or around any cemetery lot, or for improving the said premises in any other manner or form consistent with the design and purpose of this act, according to the terms of such grant, donation, or bequest."

An act to alter and amend "An act to incorporate the Greenwood Cemetery," chap. 156, Laws 1839, State of New York, passed April 11, 1839.

Under the general law of comity obtaining among the States, the Greenwood Cemetery can take the property, whether real or personal, provided by the will.

Christian Union *vs.* Yount, 101 U. S., was a suit brought by Yount and others to set aside a conveyance of land in Illinois, executed in 1870, by Stephen Griffith, a citizen of Illinois, to the Christian Union, a corporation created in 1861 under the laws of New York, providing for incorporation of benevolent, charitable, and other societies in the latter State. Under the Illinois law corporations could be formed for purposes similar to those formed under the New York law. The Circuit Court rendered a decree against the Christian Union. The decree of the Circuit Court was reversed. The following extracts from the opinion are exactly in point:

"In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court. . . . We can not presume that it is now, or was in 1870, against the public policy of Illinois that one of its citizens should convey real estate there situated to a

benevolent or missionary corporation of another State of the Union when that State permitted its own corporations, organized for like purposes, to take real estate within its limits by purchase, gift, devise, or in any other manner."

Christian Union *vs.* Yount, 101 U. S., 352, 356, 359, 360.

Cowell *vs.* Springs Co., 100 U. S., involved the right of a Pennsylvania corporation to acquire land in Colorado. There was no provision of law under which a similar corporation could be formed under the laws of Colorado, then a Territory. The court said:

"The answer to this position is found in the general comity which, in the absence of positive direction to the contrary, obtains through the States and Territories of the United States, by which corporations created in one State or Territory are permitted to carry on any lawful business in another State or Territory, and to acquire, hold and transfer property there equally with individuals. If the policy of the law does not permit the business of the foreign corporation within its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it can not be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law."

Cowell *vs.* Springs Co., 100 U. S., 55.

In McDonogh's Executors *vs.* Murdoch, 15 How., the testator was a resident of Louisiana and the estate situated there. The entire estate was left in trust, the income to be equally divided between the cities of Baltimore and New Orleans. The will specifically provided that the estate be invested in real property. One of the

principal questions was the right of the city of Baltimore to take. On this point the court says:

> "This court, in the case of The Bank of Augusta *vs.* Earle, 13 Pet., 520, said 'that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union.' This comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made.
>
> "These principles were applied to a purchase of lands by the corporation of one State in another (Runyan *vs.* Coster, 14 Pet., 122).
>
> "The principles of these cases have been adopted in Louisiana. 4 Rob. La., 517; 17 La., 46, 312.
>
> "We know of no departure from these principles in Maryland, and do not doubt that the corporations of Louisiana would take in the same manner as those of Maryland in that State."
>
> McDonogh's Executors *vs.* Murdoch, 15 How., 367.

> "The act or contract must not be contrary to the laws of the State. Accordingly, if those laws forbid devises to corporations a devise to foreign corporations is invalid, although by its constitution it may be authorized to take in that manner. . . . But this public policy must be clear and positive."
>
> Taylor on Corporations (3d ed.), sec. 387–388.

> "According to the prevailing American doctrine, in the absence of local legislation to the contrary, of which legislation there are few traces, a testator may devise lands situated in one State

to a corporation existing in another State, provided its charter gives it power to do so."

Thompson on Corporations, vol. 6, sec. 7919.

See, also—

Bank of Augusta *vs.* Earle, 13 Pet., 520.

Runyan *vs.* Coster, 14 Pet., 122.

The Baptist Association *vs.* Smith, 3 Pet., 486, 500.

The Eastern Trust and Banking Co. *vs.* Willis, 6 App. D. C., 375.

Wilson *vs.* Perry, 29 W. Va., 169.

University *vs.* Tucker, 31 W. Va., 621.

American Bible Society *vs.* Marshall, 15 Ohio St., 537.

Santa Clara Female Society *vs.* Sullivan, 116 Ill., 375.

Thompson *vs.* Waters, 25 Mich., 215.

Thompson *vs.* Swope, 24 Pa. St., 474.

Boyce *vs.* St. Louis, 29 Bar. (N. Y.), 650.

Sherwood *vs.* American Bible Society, 4 Abb. App. Dec. (N. Y.), 227.

Many other cases, both in the Federal and State courts, could be cited to sustain this contention on behalf of the Greenwood Cemetery under the doctrine of comity, but citations have been, for the present, confined only to those cases involving the acquisition of *real estate* by foreign corporations by devise or purchase. Under this head the appellants, in argument below, cited only two cases which seem to take a contrary view. They are Carroll *vs.* East St. Louis, 67 Ill., 568, and Starkweather *vs.* American Bible Society, 72 Ill., 50. These cases have been much criticised, both in the opinion in Christian Union *vs.* Yount, 101 U. S., 352, which was an appeal from the United States Circuit Court for the Southern District

of Illinois; and also in the Illinois courts in Female Society *vs.* Sullivan, 116 Ill., 375. For a discussion of the Illinois cases see Thompson on Corporations, vol. 6, sec. 7914, note.

As will be seen by reference to the New York cases collected on pages 20 et seq. of this brief, a cemetery association organized under the laws of the District of Columbia and operating within the District of Columbia, could, under a will like the one in question, made by a resident of New York, take real estate situated in New York. Assuming that the Greenwood Cemetery takes the real estate as real estate, and even assuming that a perpetuity in real estate located in the District of Columbia is created by the will, the case of Christian Union *vs.* Yount, 101 U. S., 352, and other cases cited above, control, and the Greenwood Cemetery can take. As was said by the Court of Appeals in the case at bar:

> "The rule of comity permitting a foreign corporation to acquire and hold lands by devise is now generally recognized, provided their charters permit them so to do, and no prohibition is found in the laws or public policy of the domestic State (Am. & Eng. Encly. Law, vol. 13, page 856, 2d ed.). The public policy of the District of Columbia permits, in express terms, as shown by express legislation, its cemetery corporations to receive such bequests. The State of New York permits the Greenwood Cemetery Company to hold such bequests as the one in question. It seems to us that it follows, from the general law of comity prevailing among the various States of the Union, that we should recognize and uphold the right of this appellee to receive the bequests provided by the will. While there is some conflict in the decisions of the courts of the various States, we think that the decisions of the United States Supreme Court, which are controlling upon us, favor this doctrine of comity (Christian *vs.* Yount, 101 U. S., 352). In the light of the decision in that case, it can

not be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and administer such bequests."

Iglehart *vs.* Iglehart, 26 App. D. C., 209 (Rec., p. 22).

And Anderson, J., in the equity court below:

"As was said by the United States Supreme Court in the case of Christian Union *vs.* Yount, 101 U. S., 360, it is not to be presumed to be against the public policy of the State for one of its citizens to convey property to a corporation of another State for the purpose of enabling it to carry out the objects of its creation, when that State permits its own corporations, organized for like purposes, to take and hold property within its limits."

Iglehart *vs.* Iglehart (Rec., p. 16).

II.

The Greenwood Cemetery Takes the Interest in the Real Estate as Personal Property, and Takes a Vested Interest as Legatee, Under the Doctrine of Equitable Conversion.

The clauses of the will under which it takes are as follows:

"First. I give, devise, and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M street, northwest, in the city of Washington, District of Columbia, to be held by them

in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them, provided they shall keep the said property in repair and pay the taxes thereon. *At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold,* and the proceeds of such sale shall be invested in United States securities, the interest or income from said investment to be used by the Greenwood Cemetery Company, aforesaid, as trustees, for the purpose of keeping the Andrews' cemetery lot in perpetual good order and condition."

"Twelfth. It is my will and I order and direct that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, *shall be converted into cash, and said cash invested in United States securities,* the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, *in addition to and together with the trust fund hereinbefore mentioned in clause one of this my last will,* for the purpose and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery lot in perpetual good order and condition."

While it is contended that under the decisions referred to in Part I of this brief, the Greenwood Cemetery could be the beneficiary under a will devising real estate in the District of Columbia in trust for any purpose allowed by the cemetery's charter, still the entire estate so far as the cemetery is concerned is *personal property.* Therefore no perpetuity in real estate in the District of Columbia is attempted to be created by the will.

Where real estate is directed by will to be converted into money, it is in equity regarded as money, although

it was not to be sold until after the termination of two life estates.

Cropley *vs.* Cooper, 19 Wall., 167.
Peter *vs.* Beverly, 10 Pet., 532.
Craig *vs.* Leslie, 3 Wheat., 563.
Given *vs.* Hilton, 95 U. S., 591.
Holcomb *vs.* Wright, 5 App. D. C., 76.

"It follows, therefore, that every person claiming property under a will or settlement directing its conversion must take it in the character which such instrument has impressed upon it; and its subsequent devolution will be governed by the rules applicable to property of this character."

Jarman on Wills, vol. 1, 6th ed., star page 548.

"If a direction to sell land, however, is absolute, it is no exception to the rule that land directed to be sold and turned into money is to be treated as money from the death of the testator, for all the purposes of the will, that the time of the sale is remote, and the conversion in fact can not be made until the time arrives."

Jarman on Wills, vol. 1, chap. 19, 6th ed., note 3, page 578.

See, also—

Allen *vs.* Watts, 98 Ala., 384.
Rumsey *vs.* Durham, 5 Ind., 71.
Reiff *vs.* Strite, 54 Md., 298.
Thommans Estate, 161 Pa. St., 444.
Ropp *vs.* Minor, 33 Gratt. (Va.), 97.
Ford *vs.* Ford, 70 Wis., 19.
Lent *vs.* Howard, 89 N. Y., 169, 177.

In the present case there can be no doubt that the whole of the property given by the will to the Greenwood Cemetery is *personal property*, and that the trusts do

not infringe the rule against perpetuities in the District of Columbia. As was stated by the Court of Appeals, the law of comity should be recognized even more broadly in the District of Columbia than elsewhere in cases like the one under consideration.

> "But the position of the appellee is, we think, much stronger, for we have treated the property devised by the first clause of the will as real property. It appears that the will expressly directs that the real estate shall be sold upon the death of the life tenants, and perhaps sooner. The proceeds are to be invested in personal property. The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personality from the death of the testator (Hope *vs.* Brewer, 136 N. Y., 126; Reiff & Brinkley *vs.* Strite, 54 Md., 298). It is unnecessary to multiply authorities upon this point. The real estate being once converted into personality, it matters even less than in the case of real estate, to the District of Columbia whether such property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses. The District of Columbia, and its residents, are more interested in having the right of foreign cemetery companies to take property, real and personal, situate in the District, for the purpose of the care of cemetery lots, and the maintenance and care of monuments erected thereon, recognized, than other States or their residents can be, for the reason that so many of the people domiciled in the District come from other localities, or are the descendants of those who came from such localities, and, while passing their lives here, expect upon death to be laid in cemeteries located outside the District and which are not incorporated under its laws. In considering the policy of the laws of the District we think this fact should not be lost sight of, and in interpreting its laws we must bear in mind that they

> are enacted by Congress, which represents all sections of our common country. The law of comity should, therefore, be recognized even more broadly here than elsewhere, in all questions like the one under consideration."
>
> Iglehart *vs.* Iglehart, 26 App. D. C., 209 (Rec., p. 23).

And Anderson J., in the Equity Court below:

> "So far as the real estate itself is concerned, the trust can by no means infringe the rule against perpetuities, because the will expressly directs that the land shall be sold upon the death of the life tenant at all events, and perhaps sooner, thus bringing the devise within a life or lives in being and twenty-one years thereafter."
>
> Iglehart *vs.* Iglehart (Rec., p. 16).

Under this head, the only case seemingly in point cited by the appellants in the court below, is that of Hartson *vs.* Elden, 50 N. J. Eq., 521. The testator, a citizen of New Jersey, made two bequests, one a legacy to Oak Hill Cemetery, a New Jersey corporation, the other to Buxton Cemetery, a foreign corporation. An act similar to section 669 of the District of Columbia Code was passed in New Jersey two years *after* the death of the testator. The court held that the act in question had no retroactive effect, and that the bequests were void as creating perpetuities. What is said in the opinion in comment on the force of the act as to foreign corporations is *obiter*. There was no appearance for the Buxton Cemetery Company. The court does not seem to have considered any of the decisions quoted above and no cases in point were cited in the opinion. The court said:

> "In the next place, turning to the Oak Hill Cemetery Company, it appears, while the proofs show that company to be within the class of

cemetery companies contemplated in the Act of 1878, that the will considered took effect at the death of the testator, in September 1875, more than two years before the enactment of 1878, and hence, the question arises whether vested rights intervene before the passage of that law, which the law can not effect. . . . Under the rule, then, the legacies of the trust funds should have vested, if at all, at the death of the testator. Now at that time both legacies were void under the rule against perpetuities, and the property which otherwise would have been devoted to their payment immediately vested, according to its kind, in the heirs at law or next of kin of the testator."

Hartson *vs.* Elden, 50 N. J. Eq., 522, 527-8.

III.

Where the Testator Directs a Fund to be Transmitted to Another Jurisdiction and there Applied to a Trust, the Courts of the Testator's Domicile will Uphold the Bequest when the Trust is Lawful in the Jurisdiction where it is to be Performed, Even Though it Could Not be Enforced in the Jurisdiction of Testator's Domicile.

As a general proposition it can not be denied that as to the general capacity of the testator and as to the formal validity of a will, the law of the domicile of the testator governs. This is laid down broadly in the case of Jones *vs.* Habersham, 107 U. S., 174, 178, and the cases in the Supreme Court of the United States therein cited, as well as in other cases in both the Federal and State courts. An analysis of these cases, however, will disclose the fact that in no one of them did the question before the court turn upon the validity of a bequest of personal property, which property, by the terms of the

will, *was intended to be transmitted to and remain within a foreign jurisdiction*, but that in said cases the intention of the testator was that the fund should remain within the domicile of the testator, and consequently no question of conflict of laws could arise. In fact, in none of these cases is any reference whatever made to the line of cases decided in many of the Federal and State courts and by the English courts, where the point at issue turned on *the transmission of the fund to another jurisdiction.*

While it is not considered necessary to bring the case at bar within the doctrine laid down in the cases cited under this head, because it is contended that, whether considering the property involved as real estate or as personal property, this case comes absolutely within the doctrine of comity as presented in sections I and II of this brief, yet the cases now referred to fully sustain the contention that, even assuming that the bequests contained in the will, if made to a legatee domiciled within the District of Columbia, would be invalid, still, the Greenwood Cemetery could take.

The latest case bearing on this subject (Mount *vs.* Tuttle, 2 Lawyers' Rep. An., N. S., p. 428) was decided by the New York Court of Appeals on January 9, 1906, the opinion being rendered by the chief justice and concurred in by all the judges. It was held that the validity of a bequest to a trustee resident in another State will be determined by the laws of the latter State. The subject note (on Conflict of Law as to Wills), which is appended to this case, is very elaborate and exhaustive, and collects the authorities. The author says:

> "The general principles which refer wills of personal property to the law of the testator's domicile, and wills of real property to the law of the place where the property is situated, are frequently stated by the courts in very broad and

comprehensive terms, which are calculated to convey the impression that every question that may arise in respect of a will of personal property is necessarily and under all circumstances to be determined solely by the law of the testator's domicile; and that every question in respect of a will of real property is likewise to be determined by the law of the place where the property is situated" (p. 409).

"These general statements, though doubtless sufficiently accurate for the immediate purposes of the cases in which they were made, are not to be accepted without qualification and limitation. As will subsequently be shown in this note, while very many of the questions that relate to wills of personal property are to be referred to the lex domicilii, and most of those that relate to real property are to be referred to the lex rei sitæ, yet, even upon general principles of private international law, the law of the domicile, or of the situs, as the case may be, not infrequently yields wholly or partially to the law of another jurisdiction" (p. 410).

"The general statement referred to in supra, I., that wills of personality are governed by the law of the testator's last domicile, is not without many important exceptions as applied to the essential validity, as distinguished from the formal validity of the will. Indeed, it was declared generally in Chamberlain *vs.* Chamberlain, 43 N. Y., 424, that if, within the lex domicilii, a will has all the forms and requisites to pass the title to personality, the validity of particular bequests will depend upon the law of the domicile of the legatee, and of the government to which the fund is, by the terms of the will, to be transmitted for administration and the particular purposes indicated by the testator" (p. 430).

"The purpose of the rule against perpetuities and the suspension of the power of alienation is not primarily to limit the testator's capacity, but to prevent the indefinite withdrawal of property

from the channels of commerce; and, in general, it may be said that the purpose is local, and limited to property that is within the jurisdiction, or may remain therein conformably to the will. Hence, a gift of personal property, or of real property equitably converted into personality, upon a trust to be administered in a foreign country, by the law of which it is valid, will not be held invalid, even by the courts of the testator's domicile, though it contravenes the law of that domicile against perpetuities or the suspension of the absolute ownership of property" (p. 433).

Mount *vs.* Tuttle, 2 Lawyers' Rep. An., N. S., pp. 409, 410, 430, 433.

That the above statements lay down the law correctly is made clear by a long line of cases both in the Federal and in the State courts.

Federal courts:

"The law of the testator's domicile controls as to the formal requisites essential to the validity of the will as a means of transmitting property, the capacity of the testator and the construction of the instrument (Story Conflict Laws, 8th ed., sec. 479ab; Crusoe *vs.* Butler, 36 Miss., 150; Chamberlain *vs.* Chamberlain, 43 N. Y., 431). Movable property has no locality, and therefore the law of the domicile of the owner governs its transmission either by last will or testament or by succession in the case of intestacy (Story Conflict Laws, 8th ed., sec. 481; Jones *vs.* Habersham, 107 U. S., 179, 2 Sup. Ct., 336; Howes *vs.* Remsen, 4 Johns. Ch., 460). Although, within the law of the domicile a will has all the forms and requisites to pass title to movable property, nevertheless, if the will contains a particular bequest to be transmitted to and administered for particular purposes in another State, the validity of such particular bequest must be tested by the law of the

State to which the fund is by the terms of the will to be transmitted and administered (Chamberlain *vs.* Chamberlain, supra)."

Sickles *vs.* New Orleans, 26 C. C. A., 204, 52 U. S. App., 147, 80 Fed., 868 (1897).

State courts:

"But if within the lex domicilii a will has all the forms and requisites to pass title to personalty the validity of particular bequests will depend upon the law of the domicile of the legatee and of the Government to which the fund is by the terms of the will to be transmitted for administration and the particular purposes indicated by the testator. . . . If the legatee whether a natural or artificial person and whether he takes in his own right or in trust is capable by the law of his domicile to take the legacy in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained, irrespective of the law of the testator's domicile, subject, however, to this qualification, that if the law of the testator's domicile in terms forbids bequests for any particular purpose or in any way limits the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void anywhere. But so far as the validity of bequests depends upon the general law and policy of the State affecting property and its acquisition generally, and relating to its accumulation and the suspension of ownership and the power of alienation, each State is sovereign as to all property within its territory, whether real or personal.

"It is not part of the policy of the State of New York to interdict perpetuities or gifts in mortmain in Pennsylvania or California. Each State determines these matters according to its own views of policy and right, and no other State

has any interest in the question; and there is no reason why the courts of this State should follow the funds bequeathed to the Centenary Fund Society of Pennsylvania to see whether they will be there administered in all respects in strict harmony with our policy and our laws. . . ."

Chamberlain *vs.* Chamberlain, 43 N. Y., 424.

"It seems quite clear that the bequest by the testator to the trustees or officers of the Hazlewood Cemetery, under the laws of the State of New Jersey, is a good and valid bequest, and the case of Chamberlain *vs.* Chamberlain, 43 N. Y., 424, is an authority for the position that it is the duty of this court to direct the money so bequeathed to be paid over to the trustees of the cemetery, leaving it, if there be any question in the case, to the courts of that State to provide for the administration of the trust. The recent decision of Mr. Justice Ingraham, in the case of Hope *vs.* Brewer, reported in 15 N. Y. Supp., 849, in which the cases are examined bearing upon this subject is an authority supporting the conclusion which I have reached, even if it be conceded that such a bequest, under the laws of this State, would be invalid. That concession I am not prepared to make, inasmuch as by the laws of this State (chap. 139, Laws 1881) it is provided that every corporation which shall, under authority of law, hold, occupy and use lands for a cemetery and burial place, may receive by gift or bequest any moneys or personal property for the improvement and maintenance of such cemetery, or for the maintenance, repair, preservation or ornamentation of any private plat, vault, monument, tomb, or other structure in such cemetery, according to the terms of such gift or bequest."

Doty *vs.* Hendrix, 16 N. Y. Supp., 284, 285.

"The will of the testator, so far as the courts of this State can act upon it, is fully executed, when the money is paid to the proper officer of

the foreign corporation; and there is no law of this State prohibiting gifts to such foreign corporation. *Though the laws of the State of that corporation may permit it to hold and administer property in perpetuity, the local policy of this State upon that subject is not interfered with, by allowing the property of our citizens to pass to such foreign corporations,* and be administered by it in such foreign state according to its own laws (Fordyce *vs.* Bridges, 10 Beavan, 105; S. C.. 2 Phillips, 497; Vansant *vs.* Roberts, 3 Maryl., 119; Chamberlain *vs.* Chamberlain, post 424)."

Manice *vs.* Manice, 43 N. Y., 303, 388.

A residuary bequest of real and personal property (the real property being converted into personalty by the terms of the bequest) to Scotch trustees for a charitable purpose, to be carried out in Scotland, will not be held invalid by a court of New York, because it would contravene the law of New York, where the testator was domiciled, in that it unlawfully suspends the power of alienation, and is not sufficiently definite as to the beneficiaries, if the trustees are competent to take, and the trust is valid by the law of Scotland, and can be fully carried out in that country. The court said in this case: "When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things: First, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and, second, whether the foreign trustees are competent to take the gift for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect."

Hope *vs.* Brewer, 136 N. Y., 126, 18 L. R. A., 458, 32 N. E., 558.

"It is the policy of the law of this State to allow testators free power to provide for the disposition of personalty, which is to be sent to a foreign country, in accordance with the laws of that country. Such property as shall remain within the State of New York must be subject to the laws against perpetuities and forbidden trusts, for the laws of this State in that respect are designed to operate upon all property within its limits. They are founded upon public policy, which provides for proper power of disposition of property from person to person, without undue curtailment of the right of some one, within reasonable periods, to pass the title. But the object of the law is satisfied if the property is to be removed from the jurisdiction of the State. It leaves it to the courts of that other State the power to guide and control the execution of the trusts and the fulfillment of the wishes of the executor."

Kurzman *vs.* Lowy, 52 N. Y. Supp., 83.

When the New York cases are considered together, it is clear that, in order to bring a bequest of personalty within the New York statutes against perpetuties or the suspension of absolute ownership, the testator must not only have been domiciled in New York, but the will must also contemplate that the trust shall be administered there, or, at least, it must not provide for its administration elsewhere. This conclusion is expressly recognized in—

Dammert *vs.* Osborn, 140 N.Y., 30, 35 N. E., 407.

See, also, the following:

Despard *vs.* Churchill, 53 N. Y., 192.

In re Huss, 126 N. Y., 537.

Roosevelt *vs.* Porter, 36 Misc., 441; 73 N. Y. Supp., 800.

Congregational Society *vs.* Hale, 29 N. Y. App. Div., 396.

In re Sturgis, 48 N. Y. App. Div., 624.

Robb *vs.* Washington & J. College, 103 N. Y. App. Div., 327.

In re Lang's Will, 30 N. Y. Supp., 388, 393.

Kennedy *vs.* Palmer, 1 Thompson & C., 581.

Sherwood *vs.* American Bible Society, 1 Keyes, 561, 564.

Harris *vs.* American Bible Society, 4 Abb. Pr. N. S., 421.

Mapes *vs.* American Home Missionary Society, 33 Hun (N. Y.), 360.

There are two New York cases, Wood *vs.* Wood, 5 Paige, 596, and Bascom *vs.* Albertson, 34 N. Y., 587, opposed to the position taken in the cases above cited. These two cases have been overruled by the later decisions, being referred to in the opinion in Chamberlain *vs.* Chamberlain, 43 N. Y., 424. See, also, "Subject Note" in the Mount *vs.* Tuttle case, p. 435, where the author says:

> "It seems clear that this decision (Wood *vs.* Wood, 5 Paige) must be regarded as overruled by the latter cases above cited; and the case of Bascom *vs.* Albertson, 34 N. Y., 587, has been expressly overruled, so far as it conflicts with those cases."
>
> Mount *vs.* Tuttle, 2 Lawyers' Reports Annotated, N. S., p. 435 (1906).

And see—

2 Wharton on Conflict of Laws (3d ed.), p. 1322, note.

In Maryland there are four cases in point, the following extract from the first case illustrating the rule adopted:

> "The 34th section of the Bill of Rights of Maryland is analogous to the British Statute of Mortmain, and was designed to protect the people of

Maryland from the same evils, and so far therefore, as it refers to gift or devise of personal property, it can have no extra-territorial operation. It might be very important to the people of this State that a foreign corporation should not be permitted to hold large bodies of real estate within our limits, but we can not see why it should be a matter of concern to Maryland that the personal property of her citizens should not pass away to foreign corporations, any more than to individuals living abroad. Nor is it a matter of concern to our State in legal contemplation whether the property should accumulate in the hands of foreign corporations or not. These are questions to be regulated by each State for itself."

Vansant *vs.* Roberts, 3 Md., 119.
Brown *vs.* Thompkins, 49 Md., 423.
Church Extension M. E. Church *vs.* Smith, 56 Md., 362.
Stickney Will Case, 85 Md., 79, 106.

In Virginia it has been expressly decided that a bequest of personal property, under a Virginia will, to a foreign corporation, capable of taking under the laws of its domicile, is valid, although the bequest was invalid under the Virginia laws, and would not be upheld in favor of a Virginia corporation.

Roy *vs.* Rowzie, 25 Gratt., 599, 612.
Missionary Society M. E. Church *vs.* Mandeville, 32 Gratt., 357.
Trustees Presbyterian Church U. S. *vs.* Guthie et al., 86 Va., 125.

See, also, the following cases:
Wilson *vs.* Perry, 29 W. Va., 170.
Taylor *vs.* Bryn Mawr College, 34 N. J. Eq., 101.
Fowler's Appeal, 125 Pa. St., 388.
Sickles *vs.* New Orleans, 26 C. C. A., 204.

The same rule has been adopted by the English courts. In the case of Fordyce *vs.* Bridges, 2 Phillips, 497, one

of the questions before the court was the validity of a bequest of funds in trust directed by the will to be invested in Scotland in tail, and an examination of the case will disclose the fact that it was not in any way controlled by questions relating to charities or the rights of corporations operating under foreign charters. An extract from the opinion of Lord Cottonham illustrates the point decided.

> "An objection was made that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. What the law of Scotland may be upon such a subject the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire. The fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well-established rule in case of bequests within the statute of mortmain. A charity legacy void in this country under the statute of mortmain is good and payable here if for a charity in Scotland."

Fordyce *vs.* Bridges, 2 Phillips, 497.

The same view is also adopted by the text-books on the subject of Wills, Corporations, and Conflict of Laws:

> "If, therefore, a will has all the forms and requisites to pass title to personalty according to the laws of the domicile of the testator, the validity of particular bequests will depend upon the law of the domicile of the legatee and of the government to which the fund is, by the terms of the will, to be transmitted for administration, and the particular purpose indicated by the testator. Hence, if a bequest is made to a foreign corporation for charitable purposes of personal property

situated within the State of the domicile of the testator, and bequest will be valid, provided the foreign corporation, under its governing statute, is capable of taking such a bequest for such a purpose."

Thompson on Corporations, vol. 5, sec. 5829 (1894).

"Where the personal property is situated in the jurisdiction of the testator's domicile and the testament directs that the proceeds be transmitted to another jurisdiction and there applied to a trust, the courts of the testator's domicile often give effect to such a testament when the trust is lawful by the law of the jurisdiction where it is to be performed, though it could not be enforced in the jurisdiction of testator's domicile."

Page on Wills, sec. 35 (1901).

In his work on Conflict of Laws (1901) Mr. Raleigh C. Minor, commenting on the *substantial* validity of a will, says:

"Though the older rule was that the letter of the lex domicilii should govern in all cases, even though the property disposed of was, under the will, to be enjoyed in another State, the modern tendency is distinctly in the direction of enforcing the policy rather than the letter of the lex domicilii, and if the property is to have its final situs in another State, to make the law of that State a part of the lex domicilii for the purpose of regulating that disposition."

Minor on the Conflict of Laws (1901), p. 337.

The whole subject has been summed up by Wharton in his Conflict of Laws (3d ed., published in 1905). In the chapter on Wills, under the title of "Essential Validity of Particular Provision" (vol. 2, p. 1318 et. seq.), he says:

"591*a*. Generally.—The general principle that refers a will of personal property to the law of the testator's last domicile applies, without qualifica-

tion or exception—other than such as may be made by local statute or the public policy of the forum—to the *general capacity* of the testator to make a will and to the *formal validity* of the will. It does not, however, have an invariable and unqualified applicability to questions relating to the essential validity of particular provisions of a will disposing of personal property" (p. 1318).

"If its purpose is to regulate the accumulation and holding of property, it does not ordinarily apply when the legatee is domiciled in, and the fund is to be remitted to, a foreign country" (p. 1319).

"591*b*. Perpetuities; charitable bequests; mortmain acts; limitation of time and amount of bequests; 'spendthrift' trust.—The purpose of the rule against perpetuities, and of statutes restraining the suspension of the power of alienation or absolute ownership of property, *is not primarily to limit the testator's testamentary capacity*, but to prevent the indefinite withdrawal of property from the channels of commerce; and that purpose is local, and limited to property that is within the jurisdiction and is to remain therein, or at least may remain therein comformably to the will. Hence, the validity of a devise of real property, as affected by the rule against perpetuities, or the suspension of the power of alienation is to be determined by the law of the place where the property is situated, and not by the law of the testator's domicile. When, however, there is an equitable conversion by the will, of the real property into personalty, it is to be treated as personalty for the purposes in question" (p. 1321).

"Thus, a gift in trust of personal property, or of real property equitably converted into personalty, to a charity in a foreign country where the trust is to be administered, and by the law of which it is valid, will not be held invalid even by the courts of the testator's domicile, though it contravene the law of that domicile against perpetuities or the suspension of the absolute ownership of personal property. While a court of the testator's domicile

will not administer such a foreign charity, it will so far lend its aid to the enforcement of the same as to direct the property which is the subject of the gift to be remitted to the foreign state or country for the purposes of the charity, notwithstanding that the bequest would contravene the law of the domicile" (pp. 1322–1323).

"Upon the same principles that apply to a bequest of personal property attacked as a perpetuity, a charitable bequest of personal property may be upheld if valid according to the law of the place where the trust is to administered, though it would be invalid according to the law of the testator's domicile because of indefiniteness of objects or beneficiaries, or because the purpose designated is not the subject of a valid charitable bequest" (pp. 1325–1326).

"The policy of mortmain acts generally is the protection of the people of the sovereignty by which they are enacted against the accumulation of property in perpetuity by ecclesiastical or other corporations, and does not apply to gifts, by residents, of personal property to foreign corporations" (p. 1327).

Wharton on the Conflict of Laws (3d ed., 1905), vol. 2, pp. 1318–1327.

Under this head, the appellant, on his brief in the court below, cited a number of cases, which, it was claimed, are in opposition to the doctrine set out herein. These cases are either not in point or can easily be differentiated.

The facts and decision in the case of Parkhurst *vs.* Roy, 7 Ontario App., p. 614, are as follows:

A testator domiciled in Ontario directed his executors to pay and deliver the residue of his estate to the government and legislature of the State of Vermont to be disposed as to them should seem best, having regard to certain recommendations set forth in the will.

> Held that the State was sufficiently designated as the legatee to entitle it to take the bequest, and the fact that the bequest was for the benefit of and to take effect in a foreign country could not be urged as an objection to its validity. . . . Held, also, that the direction for accumulation did not render the bequest invalid, it being for the courts of Vermont to say whether the direction should be carried out.
>
> (1882) Parkhurst *vs.* Roy, 7 Ontario App., p. 614.

In the case of Fellows *vs.* Miner, 119 Mass., 541, the question involved was as to whether the trust fund (bequeathed by a resident of Massachusetts) could be held by the court a reasonable time within which the State of New York could pass a law enabling the beneficiary, the town of Kinderhook, to take the bequest. The court said:

> "If the legislature of New York shall see fit to provide by supplemental statute for the administration of the trust according to the will, the fund may then be ordered to be paid to the town of Kinderhook. If there shall be no such legislation within a reasonable time, it will become necessary to consider whether the court should appoint another trustee or whether the bequest must fail."
>
> (1876) Fellows *vs.* Miner, 119 Mass., 541, 546.

The case of Sohier *vs.* Burr, 127 Mass., 221, was on a similar point. There was no trustee capable of receiving the bequest made by a resident of Massachusetts for poor meritorious widows living in a Connecticut town. The court said:

> "Five years afterwards the then judge of probate, upon the filing of a certified copy of the will, appointed an almoner under the provisions in question. In the following year the legislature of

> Connecticut confirmed the appointment and gave express power to the judge of probate in the premises. Held, that the charitable bequest was valid, and had not been defeated by the delay in the appointment of an almoner."
>
> (1879) Sohier *vs.* Burr, 127 Mass., 221.

In the case of Sewall *vs.* Wilmer, 132 Mass., 131, the court said:

> "In the case at bar the instrument executed by Mrs. Wilmer being sufficient under the law of Massachusetts, and therefore a good execution of a power, it is unnecessary to consider whether if it had been sufficient by the law of Maryland and insufficient by the law of Massachusetts, it would have been an equally good execution. And all the real estate concerning which the plaintiffs ask for the instructions of the court being in Massachusetts, it becomes also unnecessary to consider how far, had it been situated elsewhere, the lex domicilii should yield to the lexi rei sitæ.
>
> "The result is that in the opinion of a majority of the court the power of appointment has been well executed."
>
> (1882) Sewall *vs.* Wilmer, 132 Mass., 131, 138.

In the case of Ford *vs.* Ford, 70 Wisconsin, 19, a will directed the conversion of the testator's personal property and of his lands in Wisconsin, Michigan and Kansas, into rentable property in Kansas City, the court held as follows:

> "If a testator was, at the time of his death, domiciled in this State (Wis.), yet if he devises land in another State or directs the conversion of any of his property into such land, the validity of any suspension of the absolute power of alienation thereof is to be determined by the courts of the State in which such land is situated; and so of the legality of accumulation of rents and profits therefrom."
>
> (1887) Ford *vs.* Ford, 70 Wis., 19, 22.

Of the case of Handley *vs.* Palmer, 91 Fed. Rep., 948 and 103 Fed. Rep., 39, Wharton in his Conflict of Laws, says:

> "The value of this case as a precedent is greatly weakened."
>
> 2 Wharton on the Conflict of Laws (3d ed.), p. 1326, note.

See, also—

> "Subject Notes" in Mount *vs.* Tuttle, 2 Law Rep. An. (N. S.), p. 438, note.

In discussing the cases cited under this head as applicable to the case at bar, it is pertinent to ascertain what the law in force in the District of Columbia is as affecting perpetuities of personal property.

The Code of Law for the District of Columbia went into operation on January 1, 1902, and at that time the following general provisions were contained therein:

> "Chapter LIX. WILLS. Sec. 1624. PERPETUITIES.—No will, testament, or codicil shall be effectual to create any interest in perpetuity, or make any limitation, or appoint any uses, except as permitted by this Code."

The provision is substantially the same as the law which had existed in the District of Columbia, and which had been inherited in that form from Maryland (see Abert's Compiled Statutes, sec. 2, chap. 70). This section (1624) was REPEALED by an act amending the Code, approved June 30, 1902, thus leaving the provisions of the Code dealing with the subject of "Wills" without any provision as regards perpetuities. By that act there was added a proviso at the end of the subchapter of the Code dealing with "Estates," so that at the time of the

death of the testator the provisions of the Code, so far as they relate to perpetuities, generally read as follows:

> "Chapter XXIV, Subchapter I—ESTATES:
>
> "Sec. 1011. WHAT ESTATES IN DISTRICT.—Estates in land in the District shall be estates of inheritance, estates for life, estates for years, estates at will, and estates by sufferance."
>
> "Sec. 1023. PERPETUITIES.—Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being, by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."
>
> "Sec. 1024. CHATTELS REAL.—The provisions as to future estates shall apply to limitations of chattels real as well as to freehold estates, so that the absolute ownership for a term of years and power to dispose of the same shall not be suspended for a longer period than the absolute power of alienation in respect to a fee simple."
>
> "All the provisions of this subchapter shall apply to personal property generally except where from the nature of the property they are inapplicable" (Amendment, Act of June 30, 1902.)

The section prohibiting perpetuities has been taken away from those provisions of the Code dealing with *wills* generally, and the proviso added to the subchapter dealing with *estates* in the District of Columbia, seeking to make that subchapter apply equally to personal property as to real property. And while it is contended that whatever the peculiar wording of the statute of mortmain in the District of Columbia may be,

it must be construed in its application to personalty as applying only to the District of Columbia, still in the case at bar there is no necessity for construction, as the law in its terms is expressly limited to the District. This makes the cases cited in this section of the brief bear with all the more force on the case at bar, because in those cases the courts read into the statutes by construction the limitation which clearly appears in plain terms in the statutes of the District of Columbia.

While both the opinions below in the case at bar expressly decide the case as being within the rule laid down in Christian Union *vs.* Yount, supra., yet both the courts below also substantially adopt this view of the case:

> "But the position of the appellee is, we think, much stronger, for we have treated the property devised by the first clause of the will as real property. It appears that the will expressly directs that the real estate shall be sold upon the death of the life tenants, and perhaps sooner. The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personalty from the death of the testator (Hope *vs.* Brewer,136 N. Y., 126, 18 L. R. A., 458, 32 N. E., 558; Reiff *vs.* Strite, 54 Md., 298). The real estate being once converted into personalty, it matters even less than in the case of real estate, to the District of Columbia, whether such property goes into the hands of a foreign corporation to be held in trust as a perpetuity, or whether it be put to other uses."
>
> Iglehart *vs.* Iglehart, 26 App. D. C., 209, 217.

> "So far as the real estate itself is concerned, the trusts can by no means infringe the rule against perpetuities, because the will expressly directs that the land shall be sold upon the death of the life tenant, at all events, and perhaps sooner, thus bringing the devise within a life or

lives in being and twenty-one years thereafter. And, so far as the converted proceeds to be held and invested by this New York corporation are concerned, the District of Columbia manifestly can not be at all interested in the question of whether or not a perpetuity is created. While every State is vitally interested in the holdings of real estate within its limits, it is not in legal contemplation a matter of concern to any State whether personal property should accumulate in the hands of corporations in any other State. It is for such other State to make such regulations in that connection as it sees fit; and in the present case the State of New York has passed a law permitting its cemetery corporations to take and hold trusts for keeping cemetery lots in perpetual order and condition.

"I have cited in my opinion here numerous authorities, including: Thompson on Corporations, vol. V, sec. 5829, 1894 edition; Van Sant *vs.* Roberts, 3 Maryland, 119; Brown *vs.* Tompkins, 49 Maryland, 423; Church Extension *vs.* Smith, 56 Maryland, 362, 389; Stickney Will Case, 85 Maryland, 79, 106."

Opinion of Mr. Justice Anderson, in Iglehart *vs.* Iglehart, Equity No. 24,938, Supreme Court, District of Columbia (Rec., p. 16).

IV.

A General Code is One System of Law and Sections Dealing With the Same Subject are Construed as One Statute.

It was insisted by the appellants below that the section of the Code of Law for the District of Columbia (sec. 669) authorizing cemetery associations incorporated under the Code to take similar bequests to the ones under discussion can have no bearing on the case at bar, for the reason that this section is in conflict with section 1023 which interdicts perpetuities; that therefore these

two sections can not stand together, and the one last in order of arrangement must prevail. This contention has been decided by many of the courts to be without merit. The point has been expressly decided in the District of Columbia.

> "It would seem to be well settled that a code, or body of revised laws, should be regarded as a system of contemporaneous acts, as established *uno flatu;* or as a simultaneous expression of the law maker. Its various sections relating to the same subject should, if practicable, be construed together as one; as one act or chapter, or as continuous sections of the same act; and one chapter is to be read with another, relating to the same subject, as one body of law, though collected from independent laws of previous enactment, originally passed at different times and re-enacted by a revisory act. If possible, the various portions of such code or revision must be construed as to harmonize with one another. Its general system of legislation upon the subject-matter should be taken into view, and any particular article construed in conformity therewith, unless an intention to depart from it be clearly shown, and definitions contained in it are to be construed with reference to its positive enactments *in pari materia.*"
>
> Groff *vs.* Miller, 20 App. D. C., 353, 357.

See, also—

Petri *vs.* Commercial Bank, 142 U. S., 644, 650.
Bernier *vs.* Bernier, 147 U. S., 242.

The above cases, and many others that could be cited, support the view that section 669 of the Code of Law for the District of Columbia, conferring on cemetery associations power to accept trusts of real and personal property, must be read in connection with, and regarded as an exception to, section 1023 prohibiting perpetuities, except for charities.

V.

The Will is Clear as to the Intention to Create a Trust Fund.

It was argued below that the clauses conveying the property in trust to the cemetery were invalid, because they were only bequests of the income from the fund, and not the fund itself. It is contended on behalf of the cemetery that the intention of the testatrix to convey the fund itself as a trust fund is clear and explicit.

> "But the intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived and is not contrary to some positive rule of law it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."
>
> Finlay *vs.* King's Lessee, 3 Pet., 346.
> Earnshaw *vs.* Daly, 1 App. D. C., 218.
> DeVaughn *vs.* DeVaughn, 3 App. D. C., 50.
> Holcomb *vs.* Wright, 5 App. D. C., 76.
> Bradford *vs.* Matthews, 9 App. D. C., 438.

See, also, to the same effect:

Hardenburgh *vs.* Ray, 151 U. S., 112, 126.
Smith *vs.* Bell, 6 Pet., 68, 75.
Colton *vs.* Colton, 127 U. S., 300.
Slingluff *vs.* Johns, 87 Md., 273.

The bequest of the interest or produce of a fund without limitation as to the extent of its duration is a bequest of the fund itself.

Garrett *vs.* Rex, 6 Watts, 14.
Appeal of Pa. Co. for Ins. on Lives, 83 Pa., 312.
Collier *vs.* Collier, 3 Ohio St., 369.
Millard's Appeal, 87 Pa., 457.
Craft *vs.* Snook, 13 N. J. Eq., 121.
Gulick *vs.* Gulick's Ex., 27 N. J. Eq., 498.
Snyder *vs.* Baker, 5 Mackey, 443.
Roper on Legacies, vol. 2, p. 1476.

VI.

There is a Beneficiary Capable of Enforcing the Trust.

Much stress was laid by counsel for the heirs at law in the argument below on the proposition that the trust in this case must fail, and a resulting trust arise in favor of the heirs at law, because there was no beneficiary capable of enforcing it. It was pointed out that there is no provision in the New York law authorizing the Greenwood Cemetery to accept such trusts, such as is contained in the latter part of section 669 of the Code of the District of Columbia. This section provides that the Supreme Court of the District of Columbia shall have full power to compel the due performance of such trusts upon a bill filed by the proprietor of any lot in such cemetery.

It is admitted, of course, that a trust will always fail, and a resulting trust arise, where there is no beneficiary.

While it may be doubted whether in the absence of legislation the proprietor of any lot in the Greenwood Cemetery would have a standing in court to enforce this trust, it is certain that the proprietor of the Andrews' cemetery lot would have this power.

Even if the lot in question belonged absolutely and solely to the cemetery, the cemetery is then the beneficiary under the trust, and that it is both trustee and beneficiary is no objection. Such trusts are of everyday occurrence.

The purpose of the provision of the District Code referred to is clearly to make the proprietor of any lot a beneficiary under such trusts. The general powers of courts of equity to enforce trusts would give the right to the proprietor of the lot for the care of which the trust was created.

The appellants further contend that the Greenwood Cemetery has no power under its charter to act as trustee

in the District of Columbia for property located herein, and has not power to convert the real estate into personalty.

If there is any force in this contention, equity will intervene and appoint a trustee to carry into effect the provisions of the will in this respect. For equity will never allow a trust to fail for want of a trustee.

VII.

The Bequest in Clause Ten is Valid.

As to clause ten (by which $5,000 is directed to be raised out of the estate for the purpose of erecting a monument at the grave of testatrix's husband) the heirs at law contended below that this was void for uncertainty and unreasonableness. The amount is fixed, and the purpose of the testatrix is clear to leave the details with her executor. It would be difficult to do more than provide for "a suitable monument," unless an exact description were given in the will. It is not an unreasonable provision. The testatrix had no children and the amount for the purpose is not excessive. Even if it were, as the learned judge below in his opinion says:

> "The testatrix was at perfect liberty—whether reasonable or unreasonable from the standpoint of other people at least—in disposing of her estate, and unless mentally incompetent the disposition must be upheld. No attempt whatever has been made to raise any question here as to mental competency."
>
> Iglehart *vs.* Iglehart, Rec., p. 15.

It is respectfully submitted that the decree of the court below should be affirmed.

WALTER V. R. BERRY,
BENJAMIN S. MINOR,
HUGH B. ROWLAND,
Attorneys for the Greenwood Cemetery.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1906.

HENRY F. IGLEHART and MARY I. POLK
vs.
J. HOWARD IGLEHART, Executor, etc. } No. 158.

The facts in this case are stated in the brief to which this is attached, and also in the brief of the appellants.

This bill having been filed by the appellee as executor by reason of the fact that he could not safely administer the estate in the face of conflicting claims, without a construction of the will by a court of general jurisdiction, he made the legatees, devisees, and heirs at law parties to enable them to interplead.

He is interested in his individual interest with the appellants, but deeming his duty as the trusted executor of the deceased superior, he considered that duty should be held superior to any personal interest, and the equity court below having sustained the will, he submitted to that decision, but the appellants having taken an appeal to the Court of Appeals, he again submitted to the decree of that court. The appellants having by permission of the court obtained a severance and prosecuted their appeal to this court, he feels that it is but right and proper that he should leave the questions involved to be argued by those interested, and on his part agrees that the Greenwood Cemetery Company should, by its counsel, represent the appellee in the argument of the law and facts so far as its interests are involved, but that the appellee and the estate should be protected in the costs involved by the contention between the defendants, and asking to be protected in costs, he respectfully submits this cause to the court without argument and submits to any decree that this court may deem right.

CHAS. H. STANLEY,
Attorney for J. Howard Iglehart,
Executor, Appellee.

Supreme Court of the United States.

No. 158.—October Term, 1906.

Henry F. Iglehart and Mary I. Polk, Appellants,
vs.
J. Howard Iglehart, Executor of the last will and testament of Annie E. I. Andrews, deceased.

Appeal from the Court of Appeals of the District of Columbia.

[February 25, 1907.]

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District construing a will. (26 App. D. C. 209.) The bill was filed by the executor of the will of Annie E. I. Andrews, who was a resident of the District at the time of her death, and whose will was there duly admitted to probate March 28, 1904. The Supreme Court held that all disputed provisions of the will were valid and entered a decree to that effect, which was affirmed by the Court of Appeals, on an appeal taken by these appellants separately from the other parties defendant, by leave of the Supreme Court of the District. All necessary persons were made party to the suit. The deceased left an estate of about $10,000, of which $3,000 consisted of real estate in the city of Washington.

The disputed portions of the will are clauses one, ten and twelve, and they are set forth in the margin.*

J. Howard Iglehart, the executor, is the son of a deceased brother of the testatrix, (mentioned in the first clause of the will,) and the two appellants are, respectively, her brother and sister.

The executor, in his bill, alleged his readiness to distribute the estate as directed by the will, but he said that some of the heirs at law disputed the

*First, I give, devise and bequeath unto the Greenwood Cemetery Company, of Brooklyn, New York, as trustees, my real property, consisting of a house and lot, known and designated as house No. 88 M. street, northwest, in the city of Washington, District of Columbia, to be held by them in trust for and to the use of my brother, J. H. Iglehart, and his wife, Jennie Iglehart, of Baltimore, Maryland, during their life or the life of either of them; provided, they shall keep the said property in repair and pay the taxes thereon. At their death, or upon their failure to comply with the condition to keep said property in repair and pay the taxes thereon, it is my will and desire that the said property shall be sold, and the proceeds of such sale shall be invested in United States securities, the interest or income from such said investment to be used by the Greenwood Cemetery Com-

validity of some of its provisions, and hence his appeal to the court for a construction of those clauses.

The grounds of the dispute are stated to be that the trusts created in the first and twelfth clauses of the will are void, as in violation of the statute of the District of Columbia prohibiting perpetuities and restraints upon alienation. (Sec. 1023, Code D. C.) The devise of the real estate is alleged to be void on that ground, as is also the residuary bequest to the cemetery company, while the direction to erect a monument, as provided in section ten of the will, it is alleged, must fall with the destruction of the trust, as it is part of the general scheme of the will, and is inseparable from the trust provisions. The executor submitted the questions to the court and did not appeal from the original decree nor from the decree of affirmance by the Court of Appeals, and he now asks that this court should make proper provision for his protection and that of the estate, in regard to the costs involved by the contention between the defendant and the appellants.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The first inquiry is in regard to the law existing in the District of Columbia upon the subject of trusts of this nature. There are two sections of the Code of the District of Columbia (sections 669 and 1023) which are involved in the question before us. Section 669 (sub-chapter 6, relating to "Cemetery Associations," of chapter 18, relating to "Corporations") provides in substance that it shall be lawful for cemetery associations incorporated under the laws of the District to take and hold any grant, etc., upon trust, to apply the income thereof under the direction of the association for the embellishment, preservation, renewal or repair of any cemetery lot or any tomb or monument or other structure thereon, according to the terms of such grant, and the Supreme Court of the District is given the

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pany, aforesaid, as trustees, for the purpose of keeping the Andrews cemetery lot in perpetual good order and condition.

Tenth, It is my will, and I order and direct that five thousand dollars be raised out of my estate to be expended in erecting a suitable monument at the grave of my dearly beloved husband E. L. Andrews, in Greenwood cemetery, Brooklyn, New York.

Twelfth, It is my will, and I order and direct that all the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found, and of whatsoever it may consist, shall be converted into cash, and said cash invested in United States securities, the interest and income from such securities shall be used by the said Greenwood Cemetery Company, of Brooklyn, New York, as trustees, in addition to and together with the trust fund hereinbefore mentioned in clause one of this my last will, for the purposes and to the benefit of beautifying and keeping the aforesaid Andrews' cemetery-lot in perpetual good order and condition.

power and jurisdiction to compel the due performance of such trusts, or any of them, upon a bill filed by the proprietor of any lot in such cemetery for that purpose. Section 1023 (sub-chapter 1 of chapter 24, relating to "Estates") provides that except, in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation, which suspends the absolute power of alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter. The provisions of the section are (at the end of the sub-chapter) made applicable to personal property generally, except where from the nature of the property they are inapplicable.

The appellants assert that section 669 is nullified by section 1023. They urge that the last section, being the last expression of the legislative will, and being inconsistent with section 669, the last section must prevail. This, although section 669 makes special provision in regard to trusts of this nature and permits their creation, yet because the latter section does not in terms make exception of the trusts provided for in the earlier section, these trusts, it is urged, are thereby prohibited.

This is not a case for the application of that doctrine, which is in any event very seldom applicable. The true rule is to harmonize the whole code, if possible, and to that end the letter of any particular section may sometimes be disregarded in order to accomplish the plain intention of the legislature. Effect must be given to all the language employed, and inconsistent expressions are to be harmonized to reach the real intent of the legislature. (*Petri* v. *Commercial National Bank*, 142 U. S. 644, 650; *Bernier* v. *Bernier*, 147 U. S. 242, 246; *Groff* v. *Miller*, 20 App. D. C. 353, 357.) These two sections can be easily harmonized, and the undoubted intention of the legislature be thus carried out, by considering the latter section as applying to cases other than those specially provided for in section 669. That section must be regarded as in full force.

Assuming, however, that the section is not affected by section 1023, it is then contended by the appellants that section 669 does not apply to this case, and that the trusts are not valid as a gift or devise to a charitable use within the exception mentioned in section 1023. It may be assumed for the purposes of this case that the gifts contained in the first and twelfth clauses of the will do not constitute a valid trust for a charitable use, (*Jones* v. *Habersham*, 107 U. S. 174, 183,) and that those clauses would be illegal if dependent upon the exception mentioned in that section. But the earlier section is referred to for the purpose of ascertaining the policy

of Congress within the District upon the general subject of trusts for the perpetual maintenance of cemetery lots, and of monuments and other structures erected thereon.

That policy, as indicated in the section, permits in the District exactly what is provided for in this will, namely, a trust to a cemetery (incorporated) association for the maintenance of a lot and a monument in perpetual good order and condition.

The law in New York in regard to Greenwood Cemetery permits the same kind of a trust. (Section 6 of Chapter 156 of the Laws of New York for 1839, passed April 11, 1839.) The law of the District of Columbia, where the testatrix died and where the property was situated, and the law of the State of New York, where the moneys are to be applied by a corporation created by the laws of that State, concur in permitting such trusts as are created in this will, and under those circumstances such a trust will be permitted by the courts of the District to be carried out in the State of New York, although the testatrix was domiciled in the District at the time of her death, and the funds to be applied to such trust arise from property owned by her in the District at that time.

This is in pursuance of the general comity existing between the States of the Union, and under that the cemetery association can take and hold the property for the purposes mentioned in the will, which are permitted both by the law of the District of Columbia and the law of the State of New York.

But it is contended that the law of the District prohibits the creation of such trusts and refuses to permit them to be carried out within that District, and that there is no rule of comity which obtains in such case by which these trusts might be held valid when affecting property within the District owned by a testator residing therein at the time of his death, even though the party to carry out the terms is a foreign corporation and the trusts are to be carried out in another State. This claim is made upon the assertion that section 669 of the code, even if in force at all, refers only to domestic associations, and that foreign corporations not being within the exception, receive no power from that section and cannot take or hold property situated in the District upon these trusts.

It may be that section 669 referred only to domestic corporations, when the power was therein granted them to take such gifts upon the trusts mentioned, and carry them out in the District. The section is cited, as has been already mentioned, for the purpose of determining the general policy of Congress in relation to this class of trusts, and whether, under the law, trusts similar to those under discussion are permitted in the District. If so, then the result follows from the rule of comity already stated, that a trust of that nature, permitted in the District, will not be interfered with when it is

to be operative in a foreign State whose laws also permit it. The statute is not relied upon as a direct grant to a foreign corporation of the right to carry out a trust in a foreign State regarding property situated in the District and owned at the time of his death by a resident therein. If the statute granted such a right, of course there would be no question of its validity, nor would there be any in regard to comity.

Trusts of the same kind, although to be carried out in a foreign State by a foreign corporation in regard to property within the District, cannot be said to violate any policy or statute of the District, so long as the statute permits therein, grants on similar trusts, although to its own corporations. The prohibition of section 1023 would not extend to such a trust so provided for.

Ever since the case of *Bank of Augusta* v. *Earle*, (13 Pet. 519,) this doctrine of comity between States in relation to corporations has been steadily maintained, and it has been recognized by this court in many instances. See specially *Cowell* v. *Springs Co.*, (100 U. S. 55;) *Christian Union* v. *Yount*, (101 U. S. 352.) These cases cover, as we think, the principle involved herein.

In the opinion delivered in the Court of Appeals it was well said that "it cannot be successfully contended that something which the District of Columbia permits to its own corporations is so far against its public policy that it will not permit persons domiciled within its territory to devise their property to be used for the same purpose by a foreign corporation authorized by its own charter to receive and administer such bequests." In our opinion the first and twelfth clauses of the will are valid.

The objection to the tenth clause is based upon the assumption that the first and twelfth clauses are invalid, and that the tenth clause is so interwoven with the first and twelfth clauses that if they are pronounced void, the whole scheme of the will falls, and the tenth clause goes down with it. Holding the first and twelfth clauses valid, the contention in regard to the tenth clause also fails.

The appellees also urge that by reason of the direction contained in the will to sell the real estate it thereby became constructively converted into personalty at the time of the testratrix's death, and that, regarding it as personalty, the trusts created are still less open to any objection set up by the appellants. Although the provisions of the sub-chapter containing section 1023 apply to personal property generally, as well as to real estate, except where from the nature of the property they are inapplicable, yet when it is seen that even in regard to real estate granted to a domestic corporation for the purposes mentioned in this will, a perpetuity may be created, it seems to be still plainer, if possible, that it would not be against the policy of the District, as evidenced by the statute, to affirm the legality

of a trust of this kind in relation to personal property which is to be sold and the proceeds taken to another State by a foreign corporation for the purpose of administration in that State. In any aspect in which we can view the case, we think the disputed provisions of the will are valid.

In regard to costs, the courts below have charged the appellants with costs, and we think the same rule should obtain here. The executor may apply to the Supreme Court for such allowance out of the fund as it may think is, under all the circumstances, proper.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.